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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED

1. Does ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), require an employee benefit plan to identify specific individuals within the sponsoring organization who have authority to amend the plan, or otherwise require an amendment procedure more detailed than that contained in a plan that expressly reserves the sponsor's right to amend the plan?

2. Does a procedural noncompliance with ERISA causing no harm to plan participants—here, the Court of Appeals held that a plan's amendment provisions were insufficiently specific under ERISA § 402(b)(3)—give rise to a substantive remedy—here, striking an amendment from the plan document to invalidate a termination of nonvested welfare benefits?

PARTIES TO THE PROCEEDING

All parties to the proceedings below are parties before this Court. The named respondents are Frank C. Schoonejongen, Wesley L. Losson, John S. Dunning, William Martone, William V. Hanzalek, Edward F. Ziek, Melvin Deblock, Joseph Colquhoun, Joseph Majerscak, Gerard Abbamont, and Olga Wolsey. The named respondents represent a class consisting of retired, nonbargaining unit employees from the petitioner's Wood-Ridge, New Jersey, facility.

The petitioner is Curtiss-Wright Corporation. Pursuant to Rule 29.1 of the Rules of the Court, petitioner states that it has no parent or subsidiary corporations (except wholly owned subsidiaries).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Curtiss-Wright Corporation respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 3, 1994.

OPINIONS BELOW

The opinions of the United States District Court for the District of New Jersey are not reported. (App. 34, 42).[1] The original opinion of the United States Court of Appeals for the Third Circuit issued December 28, 1993, its March 3, 1994

[1] "App." refers to the Appendix to this Petition. "J.A." refers to the Joint Appendix filed with the Third Circuit.

order granting rehearing and vacating its original opinion, and its March 14, 1994 order denying the suggestion for rehearing in banc are unreported. (App. 17, 107, 109). Its final opinion is reported at 18 F.3d 1034. (App. 1).

JURISDICTION

The original opinion of the Court of Appeals was entered on December 28, 1993. (App. 17). A petition for rehearing, filed January 11, 1994, was granted by order entered March 3, 1994, vacating the original judgment. (App. 107). The suggestion for rehearing in banc was denied by order entered March 14, 1994. (App. 109).

The judgment of the Court of Appeals as to which review is sought was entered on March 3, 1994. (App. 1, 111).

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3(9) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(9), provides:

> The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), provides:

> Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

ERISA § 402(b), 29 U.S.C. § 1102(b), provides:

> Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

ERISA § 502(a), 29 U.S.C. § 1132(a), provides:

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary,or by a participant, or beneficiary for appropriate relief in the case of a violation of section 1025(c) of this title;

> (5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or
>
> (6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section.

STATEMENT OF THE CASE

This action arises from a plan sponsor's termination of non-vested employee welfare benefits under a unilaterally adopted plan. On November 30, 1983, Curtiss-Wright Corporation terminated plan health insurance benefits for respondents and other nonbargaining unit retirees from its Wood-Ridge, New Jersey, facility when it closed that facility due to the loss of a military contract essential to its continued operation.[2] (A.3, 6; J.A. 778-79, 1102-03). Respondents filed suit in the United States District Court for the District of New Jersey, asserting, *inter alia*, a claim for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Respondents invoked the District Court's jurisdiction under ERISA § 502(f), 29 U.S.C. § 1132(f), and under 28 U.S.C. § 1331.

In 1976, in order to bring its benefit plans into compliance with ERISA, Curtiss-Wright established a Constitution as a general plan instrument. (App. 4). In addition to reserving the Company's right to terminate the plan "for any reason at any time," the Constitution provided:

> The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan.

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[2] Under the plan, all affected retirees had the option of converting to individual policies. (J.A. 680).

(*Id.*) Other plan and nonplan documents distributed to participants also reserved these rights. (App. 4-5, 35-36, 67-69).

The Constitution incorporated as plan documents other materials setting forth the terms and conditions of benefits more specifically, including current summary plan descriptions. (App. 4; J.A. 1234-35, 1252). In early 1983, Curtiss-Wright issued a revised summary plan description in connection with a change in insurance carriers, as it had done in the past. (App. 5). The District Court found that this 1983 document governed the terms of the plan applicable to plaintiffs. (App. 36, 38-39).

The amendment at issue is set forth in this 1983 plan document:

> Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired.

(App. 5-6). This language was added to the plan by the Company's Corporate Director of Benefits and its Labor Counsel, with the approval of its Executive Vice President—the same executives who had established the plan Constitution in 1976 and who were responsible for administering the plan. (J.A. 1141-42, 1204, 1235-36).[3]

After trial, the District Court found as trier of fact that Curtiss-Wright had reserved before 1983 the rights to terminate or amend the plan and held that plaintiffs' benefits had not vested. (App. 35-36). The District Court concluded, however, that the lawfulness of the termination of plaintiffs' benefits depended on the validity of the 1983 amendment. (App. 37). Although the District Court found that the amendment had been incorporated in a "governing document" of the plan

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[3] Because Curtiss-Wright already had reserved the right to terminate the plan "for any reason at any time" (App. 4), Curtiss-Wright maintained and its representatives testified at trial that they did not regard the term added in 1983 as changing substantive rights of the parties. (J.A. 1142, 1236-39).

applying to plaintiffs and that plaintiffs had received timely notice of the amendment, it held that the amendment was invalid because the plan did not provide an amendment procedure. (App. 37-39). The District Court entered judgment requiring Curtiss-Wright to pay $2,681,086 in past benefits to plaintiffs. (App. 105).

On appeal, the Court of Appeals for the Third Circuit agreed that, although Curtiss-Wright had reserved the rights to amend or terminate the plan and plaintiffs' benefits had not vested, Curtiss-Wright did not properly terminate those benefits. (App. 2). In its original opinion, the Court rejected Curtiss-Wright's argument that its express reservation of the right to terminate the plan for any reason encompassed the lesser right to terminate plaintiffs' benefits without amending the plan because, the Court reasoned, Curtiss-Wright would still have been required to comply with "termination procedures" prescribed by ERISA § 4041(b), 29 U.S.C. § 1341(b), for certain pension plans. (App. 23-25). On rehearing, the Court vacated its original decision and issued a new opinion, no longer relying on § 4041(b), and instead rejecting the argument on the ground that the notice provided to plaintiffs of the amendment and of the termination of their benefits did not constitute "notice of plan termination" under ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1). (App. 12). The rest of the Court's decision remained unchanged.

The Court affirmed the finding of a violation of § 402(b)(3), which requires a procedure for amendment and "identifying the persons who have authority to amend the plan." Although ERISA § 3(9), 29 U.S.C. § 1002(9), defines "person" to include a "corporation," the Court of Appeals found noncompliance with § 402(b)(3) because Curtiss-Wright's plan provided for amendment by "the Company" rather than by specific individuals. (App. 8). Although the amendment had been incorporated in a plan document distributed to plan participants, the Court reasoned that the statutory purpose of ensuring that participants can rely on the plan documents required striking the amendment. (App. 10-11).

The Court of Appeals therefore affirmed the District Court's judgment. (App. 16).

REASONS FOR GRANTING THE WRIT

By holding that the amendment provision in Curtiss-Wright's plan failed to comply with § 402(b)(3) of ERISA and that the amendment at issue was invalid, the decision below unsettles countless employee benefit plans. Many plans, including any that follow prototype plans approved by the Internal Revenue Service, have amendment provisions substantively identical to the one in Curtiss-Wright's plan. Under the decision below, all of those plans violate § 402(b)(3). Many, if not all, of those plans also have been amended over the years. Under the decision below, the terms of any such plans are now uncertain: Any amendments—including those that for years have been included in the plan documents and followed as controlling plan terms—may be invalid. The liability imposed on Curtiss-Wright portends the possible liability of numerous other sponsors, administrators, and fiduciaries who have amended plans or enforced or followed plan amendments.

The two questions presented by this petition have importance commensurate with this far-reaching impact. Further, the second question presented is one on which the Courts of Appeals have disagreed. Curtiss-Wright's amendment likely would have been upheld in the Fourth, Sixth and Seventh Circuits despite the violation of § 402(b)(3) found below.

The questions presented are important and substantial for another reason. The decision below construes and applies § 402(b)(3) to create both a requirement—that plans identify specific individuals to amend the plan—and a remedy for noncompliance—automatic invalidation of amendments—that ERISA does not expressly impose. In doing so, it weakens two fundamental statutory policies. First, by failing to distinguish between a violation of § 402(b)(3) that causes substantive harm and one that does not, and thereby imposing lia-

bility out of all proportion to any harm, the decision below upsets ERISA's balance between the regulation of benefit plans and the costs of compliance. Second, by striking a term set forth in the plan documents, the decision conflicts with the purpose of ERISA's written instrument and disclosure requirements: to ensure that the current plan documents define a plan's current terms.

Since the consequence of a failure to comply with § 402(b)(3) is not expressly defined by ERISA, it should be defined by reference to these basic policies. Curtiss-Wright submits that this Court's intervention is required to protect these policies and to protect innumerable plans, and the persons associated with them, from unintended and unnecessary burdens.

I. The Questions Presented Have Broad and Immediate Importance.

The decision below already has been followed to invalidate amendments in other plans.[4] Indeed, it puts in violation of § 402(b)(3) any plan using standard amendment clauses. Plans following prototype forms distributed by the Internal Revenue Service do not comply with the statute as construed below; they provide as to amendment only that "The sponsoring organization may amend any part of the plan." 7 *Pension and Profit Sharing 2d* (R.I.A. 1992) at 104,569 (reprinting a form distributed by the Internal Revenue Service to sponsors of master and prototype pension benefit plans). Plans following

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[4] *See Lacilento v. H&M Consolidation Services, Inc.*, Civ. No. 92-2331 (DRD) (D.N.J. 1994) (invalidating an amendment capping benefits under a health insurance plan which provided that the "Company shall have the authority to amend the plan"); *see also Algie v. RCA Global Communications Inc.*, 89 Civ. 5471 (MJL), 1994 WL 132358 at pp. *20-22, 1994 U.S. Dist. LEXIS 4735 at pp. **64-69 (S.D.N.Y. 1994) (stating that an employer-sponsor could not lawfully have amended or terminated a severance benefits plan which "reserve[d] to the sponsor the authority to amend or terminate the plan at any time" but failed to specify a procedure or identify individuals with amendment authority).

other standard forms similarly fail to comply under the decision below. *See* 5A Rabkin & Johnson, *Current Legal Forms* (M. Bender 1993), Form 13.01 at 13-1021 and Form 13.03 at 13-1081 ("The Plan may be amended . . . by the Company"); *Corbel Pension Plan Forms* (1992) at DB-8-301 ("The Employer shall have the right . . . to amend the Plan . . . . However, any amendment which affects the rights, duties or responsibilities of the Administrator may only be made with the Administrator's written consent"). *See also, e.g.*, Sherwin P. Simmons, "Third Circuit Shocks Pension Practioners," 63 Tax Notes 335 (April 18, 1994).

The decision below has immediate and serious consequences for these plans and the persons associated with them. First, plan sponsors, administrators, fiduciaries, and plans themselves face enormous potential liabilities for past actions. While plan sponsors may attempt to conform plans *prospectively* to the construction of § 402(b)(3) announced below, the invalidation of prior amendments changes plan terms *retrospectively*. As a result, actions previously taken in good faith in accordance with amended plan terms and reservations of right become unlawful. The resulting exposure is not limited to plans under which benefits—even, as in this case, nonvested benefits—were terminated. It exists wherever there have been amendments substantively affecting benefits: for example, changing how benefits are funded, accrued, calculated or vested, or changing levels or forms of insurance coverage.

Second, the decision below makes it difficult even to determine the current terms of many plans. Any term added by amendment since the enactment of ERISA almost 20 years ago must be isolated and evaluated. That is a daunting task for plan sponsors, administrators, and fiduciaries, particularly since amendments long ago incorporated in the plan documents generally will be indistinguishable from other plan terms. Nonetheless, under the decision below, it is a task they must undertake to avoid enforcing and following plan terms that may later be found invalid.

Until and unless this Court intervenes, the uncertainties created by the decision below will continue. Such uncertainties, and the potential liabilities they carry, burden the administration of employee benefit plans across the country. This substantial burden is unnecessary and intolerable under ERISA and should be removed.

II. The Decision Below Conflicts with the Decisions of Other Courts of Appeals.

Two other Courts of Appeals have directly addressed whether a violation of § 402(b)(3) may invalidate a plan amendment. Both reject the essential premise of the decision below: that the validity of an amendment depends on the plan's compliance with § 402(b)(3).

In *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990), the Court of Appeals for the Sixth Circuit upheld an amendment to a severance benefit plan that, since it previously had been unwritten, contained no amendment provision at all. The Court found nothing in § 402(b)(3) requiring that the amendment be invalidated:

> We do not believe . . . that Congress intended that any plan failing to comply with section 1102(b) [ERISA § 402(b)] would, for that reason alone, become unamendable. Plaintiffs have failed to show any detrimental reliance based on the defendant's failure to comply with section 1102(b), and, under these circumstances, we decline to impose the substantive remedy of prohibiting plan amendment in response to defendant's procedural violations.

905 F.2d at 949.

In *Biggers v. Wittek Industries, Inc.*, 4 F.3d 291 (4th Cir. 1993), the issue arose again in the context of a severance benefits plan that contained no amendment provision and, therefore, failed to comply with § 402(b)(3). The Court of Appeals for the Fourth Circuit agreed with the conclusion in *Adams*

that an amendment's validity does not depend on compliance with § 402(b)(3). 4 F.3d at 295. As did this Court in *Firestone Tire & Rubber Corp. v. Bruch*, 489 U.S. 101, 110-11 (1989), the Court then looked to analogous trust principles for guidance:

> A situation much like the one before us occurs in trust law when a settlor reserves the power to modify or revoke a trust, but fails to specify a method for implementing changes. If such power is reserved, then the settlor may exercise the power in any manner that "sufficiently manifests his intention to modify the trust."

4 F.3d at 295, quoting *Restatement, Second, of Trusts* § 331, comment c. *See also* G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 993 at pp. 233-39 (2d rev. ed. 1983); W. Fratcher, *Scott on Trusts* § 331 at pp. 378-81 (4th ed. 1989).

The Court below addressed neither *Adams* nor *Biggers*, citing instead *Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246 (7th Cir. 1991). (App. 10-11). *Albedyll*, however, comports with *Biggers* and *Adams*. In *Albedyll*, the Court invalidated a putative amendment that conflicted with an amendment procedure expressly set forth in the plan as a "limitation on amendments." 947 F.2d at 254-55. As in *Biggers*, trust principles supplied the rule:

> If the settlor reserves a power to modify the trust only in a particular manner or under particular circumstances, he can modify the trust only in that manner or under those circumstances.

947 F.2d at 254, quoting *Restatement, Second, of Trusts* § 331, comment d. The Seventh Circuit did not suggest that a failure to comply with § 402(b)(3) prohibited plan amendments. To the contrary, the Court noted that the plan before it did not require that its amendment procedure be followed for one of the amendments there at issue. 947 F.2d at 251 n.7. The Court held that this amendment was valid, *id.* at 255, even though it was promulgated without a written amendment procedure. The conclusion that the Seventh Circuit aligns with the Fourth and

Sixth Circuits and not the Third Circuit on this issue is buttressed by *Murphy v. Keystone Steel & Wire Co.*, ____ F. Supp. ____, 1994 WL 172252 at pp. **11-14, 1994 U.S. Dist. LEXIS 5890 (C.D. Ill. 1994), in which the Court, concluding that the Seventh Circuit would reject *Schoonejongen* and follow *Biggers* and *Adams*, upheld an amendment despite the absence of an amendment procedure.

Under each of these decisions, the amendment struck down below would have been upheld. The amendment was incorporated in the plan documents as a plan term, its manner of adoption did not conflict with the plan documents, and any procedural defect caused no harm to participants. Indeed, there could be no more certain manifestation of an employer's intent to modify an employee benefit plan than the incorporation of a new term in the plan documents.

This conflict underscores the need for immediate review by this Court. The split among the circuits aggravates the uncertainties imposed on employee benefit plans and their sponsors, administrators, and fiduciaries. As in this case, a single plan may be administered or the sponsor may be found in two or more circuits. Because different Courts of Appeals do not agree on how the validity of plan terms added by amendment should be determined, the terms of a single plan may vary depending on who gets to which courthouse first. Even the terms of a plan applying only within a single circuit depend on what rule that circuit follows.

Employers, and other sponsors, administrators, and fiduciaries, cannot wait for the issue to percolate further in the lower courts. The uncertainties and potential liabilities they face, the difficulty of administering plans whose terms may vary predictably or unpredictably by location, and the resulting increase in the costs of maintaining employee benefit plans are all too great. Again, until and unless this Court intervenes, those burdens will continue.

III. The Decision Below Weakens Fundamental Policies of ERISA.

A. The Decision Creates a Requirement and a Remedy Not Imposed by the Statute.

This Court itself has refused to rewrite ERISA by inferring obligations and remedies Congress did not expressly provide. *See Mertens v. Hewitt Associates*, 508 U.S. ____, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (holding that ERISA § 502(a)(3) does not authorize an action against a nonfiduciary who allegedly participated in the plan fiduciaries' wrong); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147-48 (1985) (holding that ERISA § 409(a) does not authorize an action for extra-contractual damages). The decision below, however, does just that.

First, the decision below creates a new requirement by redefining a statutorily defined term. ERISA § 402(b)(3) requires a procedure to identify "persons who have authority to amend the plan." ERISA § 3(9) defines "person" to include a "corporation." 29 U.S.C. § 1002(9). But the decision below ignores this definition: It holds that the amendment procedure "by the Company" fails under § 402(b)(3) because the procedure does not identify "what individuals or bodies within the Company could promulgate an effective amendment." (App. 8). Nothing in § 402(b)(3) requires a plan to identify specific individuals within a corporation who have amendment authority.

Second, the decision creates a draconian remedy for noncompliance with § 402(b)(3)—automatic invalidation of plan amendments—not found in the statute. On its face, § 402(b)(3) addresses neither the validity of plan amendments nor an employer's right to amend; it sets forth only a disclosure content requirement. Consistently, § 402(b)(1) does not condition the validity of plan funding on its requirement that the plan "provide a procedure for establishing and carrying out a funding policy," and § 402(b)(4) does not condition the

validity of plan payments on its requirement that the plan "specify the basis on which payments are made to and from the plan." Nor does effective enforcement of § 402(b)(3) require the automatic invalidation of plan amendments. A participant or the Secretary of Labor, for example, can sue under § 502(a)(3) or § 502(a)(5) for injunctive relief compelling a plan sponsor to set forth a procedure for amendment in the plan documents. 29 U.S.C. §§ 1132(a)(3), 1132(a)(5).

The construction and application of § 402(b)(3) below conflicts with the statutory language and scheme. It is therefore intolerable. It is particularly so, however, because it also undermines fundamental statutory policies.

B. The Decision Upsets the Balance of ERISA's Regulation of Benefit Plans and Compliance Costs.

ERISA carefully balances the regulation of benefit plans and the costs of compliance. "There is a 'tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs.' " *Mertens v. Hewitt Associates*, *supra*, 113 S.Ct. at 2072, 124 L.Ed.2d at 174 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981); bracketed material added by the Court). Congress was concerned lest excessive costs discourage employers from offering and maintaining benefit plans at all. *See, e.g.*, H. Rep No. 93-533, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4639-40 (Educ. and Labor Comm.); S. Rep. No. 93-383, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4890 (Finance Comm.). *See also Alessi*, 451 U.S. at 515.

This balance is fundamental to ERISA's remedial scheme and, particularly, to the extent to which ERISA imposes liability for noncompliance with its regulatory provisions. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). Thus, this Court has refused to create liabilities that ERISA does not expressly impose. *See Mertens v. Hewitt Associates*, *supra*; *Massachusetts Mut. Life Ins. Co. v. Russell*, *supra*. The same balance underlies holdings that procedural violations of

ERISA do not give rise to substantive relief affecting benefit entitlements, at least not in the absence of specific harm. *See, e.g., Lewandowski v. Occidental Chemical Corp.*, 986 F.2d 1006, 1008-10 (6th Cir. 1993); *Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743-44 (7th Cir. 1991); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1167-70 (3d Cir. 1990); *Adams v. Avondale Industries, Inc., supra*, 905 F.2d at 949; *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353-54 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985); *Govoni v. Bricklayers, Masons & Plasterers*, 732 F.2d 250, 252 (1st Cir. 1984).

This case presents a stark example of how the statutory balance may be upset by judicial intervention. The only violation found below was that Curtiss-Wright's plan did not have a sufficient amendment procedure. No participant was less informed of the possibility of amendment because of this violation. Nor was any participant less informed of the amendment at issue once it was made. Indeed, the amendment was promulgated in a way that ensured disclosure: It was incorporated in a revised plan document distributed to participants. Nor was any participant less certain of the amendment's authority. From the perspective of participants reviewing a revised plan document issued by Curtiss-Wright, the revisions incorporated in that document could only have been perceived as made "by the Company."

As a result, the liability imposed on Curtiss-Wright bears no relation to the violation found. The decision below thwarts Curtiss-Wright's acknowledged rights to amend the plan and terminate benefits, holding the Company liable for $2,681,086 for terminating nonvested benefits. By contrast, no one has identified any harm to any plan participant from the plan's failure to specify a "person" other than "the Company" to amend the plan or otherwise to provide a more detailed amendment procedure.

For employee benefit plans in general, the Third Circuit's ruling thus has precisely the effect ERISA was intended to avoid. Employers are faced not only with the uncertainty of whether or not their plans comply with § 402(b)(3)—a dis-

tinction the Court below holds to depend on differences as slight as that between "modification by the Trustees" and "modification by the Company"[5]—but with the threat of immense liability for noncompliance. This possibility provides a substantial disincentive against creating and maintaining employee benefit plans.

A substantive remedy may be appropriate if a violation of § 402(b)(3) causes substantive harm to plan participants. *See Biggers v. Wittek Industries, Inc.*, *supra*, 4 F.3d at 296 n.1; *Adams v. Avondale Industries, Inc.*, *supra*, 905 F.2d at 949. But the general rule laid down by the Third Circuit fails to correlate the remedy and the harm—in this case, there was no harm. Curtiss-Wright respectfully submits that, by elevating procedure over substance, the decision below upsets a critical balance underlying ERISA.

C. The Decision Below Erodes the Integrity of the Plan Documents.

ERISA § 402(a)(1) requires that "[e]very employee benefit plan . . . be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). It and § 402(b)(1) serve a common purpose: to ensure that "every employee may, by examining the plan documents, determine exactly what his rights and obligations are under the plan." H. Conf. Rep. No. 92-1280, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5077-78. This common purpose reflects a compelling policy under ERISA. Thus, courts have held that the plan terms as set forth in the plan documents cannot be modified, invalidated, or otherwise disregarded based on ERISA reporting and disclosure violations. *See* cases cited at p. 15, *supra*. Further, courts have held that the plan terms cannot be modified by informal communications. *See, e.g., Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1265

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[5] App. 8, distinguishing *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990), *cert. dismissed*, 113 S.Ct. 1070 (1993).

(10th Cir. 1988); *Nachwalter v. Christie*, 805 F.2d 956, 959-61 (11th Cir. 1986); *but see Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990).

The Court below recognized this fundamental policy: "[T]he participants are entitled to rely upon the plan document as defining the benefits currently being provided." (App. 10). It further observed that § 402(b)(3) "provides certainty and protects participants against frustration of their legitimate expectations" by ensuring "that employees understand how their rights may be modified in the future." (App. 9 n.4, 10).

By striking an amendment set forth in the plan documents, however, the Court's decision takes away more certainty than it provides. Section 402(b)(3) promotes the clear identification of what statements are intended to amend the terms of an employee benefit plan. That purpose is fulfilled, however, once an amendment is incorporated as a plan term in the plan documents. *Cf.* 29 C.F.R. § 2520.104a-4(b)(2) (the requirement that a description of a material plan modification be filed with the Secretary of Labor is fulfilled by filing a plan description or summary plan description incorporating the modification).

By contrast, the potential invalidation of amendments incorporated in plan documents means that plan documents are no longer dispositive of plan terms. Participants cannot rely on the current plan documents because any variations from prior plan documents would have to be evaluated by reference to the manner by which the changes were made—a matter not reflected in the plan documents and often beyond an employee's ability to discover. A participant's dilemma is worsened because, once incorporated in the plan documents, an amendment is indistinguishable from other plan terms. The particular certainty the decision below seeks to ensure—participants' knowing precisely the procedure for modifying their rights in the future—provides little benefit if participants cannot rely on the current plan documents to ascertain the present plan terms.

The theory of the Court below that its remedy "enforce[s] the plan as written" rather than alters the plan terms is not correct. (App. 10). The Court reasoned that "[u]nless and until the written plan is altered in a manner, and by a person or persons, authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan." (*Id.*) The judgment affirmed below, however, does not enforce the terms of the plan as it was originally established—whether that would be when Curtiss-Wright first provided health benefits to its employees, when in 1966 it first provided health benefits to retired employees, or when in 1976 Curtiss-Wright established the plan instruments under ERISA. Instead, the plan terms purportedly enforced by the courts below are those set forth in the 1983 plan document, with the sole exception of the termination clause at issue. (App. 38). The plan terms as stated in that plan document vary in many particulars from those stated in previous documents. To apply the Court's reasoning consistently, each provision in the 1983 plan document would have to be compared with prior provisions; if it varies, then its validity would have to be evaluated based on how the change was made. Indeed, if the decision below stands, all plan terms added by amendment are potentially vulnerable to being stricken judicially.

The Third Circuit attempts to confine its holding to amendments "advantageous to the sponsor's interest." (App. 11 n.5). This also fails to avoid the underlying problem, for at least two reasons. First, not all plan amendments may be easily categorized as advantageous to either the sponsor's or participants' interests. Even an amendment terminating or limiting benefits for certain participants, such as the amendment at issue here, advantages other participants if it contributes to the continuation of the plan as a whole. Other amendments—such as a change in health insurance carriers accompanied by an increase in both maximum coverage amounts and deductibles—also defy categorization. Second, the integrity of the plan documents cannot depend on whether terms favor the sponsor or the participants. Participants are not the only

ones entitled to rely on the plan documents. The plan sponsor is entitled to rely on plan documents as fixing the extent of its obligations;[6] plan administrators and other fiduciaries are required to rely on the plan documents in fulfilling their responsibilities. Parties can rely on the current plan documents only if the terms set forth in those documents, whether advantageous or not, are the plan terms.[7]

There may be room to invalidate putative plan amendments based on violations of § 402(b)(3) in certain circumstances without infecting the plan documents with uncertainty. But the general rule announced below is too broad because it invalidates terms set forth in the plan documents. The rule provided by trust law better serves the statutory purpose: When the right to amend is reserved but no procedure for amendment specified, the validity of a putative amendment depends on whether there was "a clear manifestation of an intent to alter the policy or plan." *Biggers v. Wittek Industries, Inc.*, *supra*, 4 F.3d at 295-96. From any perspective, and particularly that of a plan participant, there is no clearer manifestation of a plan sponsor's intent to amend a plan than its revision of the plan documents.

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[6] As are the stockholders, creditors, and other persons to whom a sponsor may be required to report its liabilities.

[7] The Courts of Appeals overwhelmingly have acknowledged this by refusing to enforce informal, "extra-plan" communications allegedly modifying benefits from those provided under the plan documents—whether to increase or decrease benefit entitlements. *See* cases cited at pp. 16-17, *supra*.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari on both of the questions presented.

Respectfully submitted,

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May 1994

Supreme Court,
FILED
JUN - 1 1994
OFFICE OF THE CLERK

No. 93-1935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Appendix A

Opinion of the Court of Appeals for the Third Circuit
(March 3, 1994) Filed March 3, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 92-5695 and 92-5710

FRANK C. SCHOONEJONGEN; WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated

v.

CURTISS-WRIGHT CORPORATION

Appellant in No. 92-5695

Frank C. Schoonejongen, Wesley L. Losson, John S. Dunning, William Martone, William V. Hanzalek, Edward F. Ziek, Melvin Deblock, Joseph Colquhoun, Joseph Majerscak, Gerard Abbamont, and Olga Wolsey, on their own behalf and on behalf of the class of persons they represent,

Appellants in No. 92-5710

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 84-04542)

Argued September 10, 1993

BEFORE: STAPLETON, ROTH and LEWIS,
Circuit Judges

(Opinion Filed March 3, 1994)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

This appeal and cross-appeal involve a controversy precipitated by defendant Curtiss-Wright's (CW's) termination of health insurance benefits for former employees who had retired from a plant in Wood-Ridge, New Jersey. The district court found that CW had reserved the right to amend its benefits plan to allow termination of benefits, but that CW had violated ERISA § 402(b)(3), 29 U.S.C. § 1102(b), by failing to include an amendment procedure among the plan's provisions. The court concluded that the lack of an amendment procedure rendered invalid a purported amendment authorizing termination of plaintiffs' benefits. As a result, the district court entered a judgment in excess of $2 million in favor of the plaintiffs' class. It declined, however, to find a non-terminable lifetime right to benefits for the plaintiffs' class. We will affirm.

I. FACTUAL BACKGROUND

The facts are largely undisputed. CW owns a number of industrial plants. One, in Wood-Ridge, New Jersey, opened during World War II and did defense-related work for forty years. Following a period of declining business, this plant closed in late 1983. At that time, CW notified a class of individuals who had retired from the Wood-Ridge plant that their health benefits were being terminated.

In 1984, a number of retirees who had their benefits terminated brought this suit as a class action on behalf of "all those retired Wood-Ridge employees who were not members of the bargaining unit represented by the United Auto Workers at the time of their retirement and whose post-retirement medical benefits were terminated or denied on or about December 1, 1983." The complaint alleged that CW's termination of benefits was wrongful and that the plaintiffs had a vested right to retiree health benefits for life. Plaintiffs sought damages as well as declaratory and injunctive relief.

A. The Benefit Program: 1966-82

In 1966, CW established a post-retirement health benefits program for the Wood-Ridge facility. CW was the plan sponsor and administrator of the plan, as well as its sole source of funding. From 1966 to 1983, the benefits were provided by a succession of health insurance plans provided by several different carriers. Each time a plan terminated and a new one was initiated, notice was apparently sent to the plaintiffs.

From 1966 through 1970, Liberty Mutual provided the insurance benefits. During this period two booklets were sent to retirees stating that benefits would terminate upon death or "if the Group Policy terminates." From 1971 through 1972, Prudential was the insurance carrier for retiree health benefits. Apparently, little, if anything, was provided during this period in the way of documentation. From 1973 through 1974, Blue Cross/Blue Shield provided benefits and CW sent retirees a letter summarizing those benefits. The letter stated that coverage would terminate upon death or "the date the class of persons of which the

retiree is a member ceases to be covered by the program" and also stated that CW "reserves the right to modify, revoke, suspend, change, or terminate the program, in whole or in part." The term "class of persons of which the retiree is a member" was not defined. However, the contract between CW and Blue Cross/Blue Shield included in the classification of employees eligible for benefits: "All full-time salaried non-bargaining exempt and non-exempt Employees retired prior to January 1, 1973" and "All full-time salaried, non-bargaining exempt Employees retired on or after January 1, 1973."

In September, 1976, CW established a welfare benefit plan in accordance with the recently enacted ERISA statute. The plan had a written Constitution and Trust Agreement. The Constitution provided in part that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." It also provided that "the Company reserves the right to terminate the Plan established hereby for any reason at any time." The Constitution did not specify any particular benefits but simply incorporated any "plan or plans" CW might "from time to time adopt." Also at that time, CW changed the manner in which it provided benefits: it began to self-insure, at least with respect to the medical-surgical benefits, and contracted with various carriers to administer the program.

In accordance with ERISA's requirements, Summary Annual Reports (SARs) were provided to plan participants. Starting in 1979, CW added the following reservation language to these SARs: "The company expects and intends to continue this plan indefinitely, but reserves the right to discontinue or amend it."

Plaintiffs claim that from 1976 through 1983, although active employees received Summary Plan Descriptions (SPDs), retirees did not. CW insists that SPDs were sent to retirees. In any event, the 1976 SPD, which was prepared by CW and Prudential and not replaced until 1983, provided in part: "When your employment terminates, or you cease to be a member of a class eligible for insurance under any part of the plan, your insurance under that part

of the plan will cease.... Your insurance under the group policy will also terminate upon discontinuance of the group policy." Nothing in the SPD defined "class," although the underlying agreement between CW and Prudential listed sixteen classes of employees including: "14. All full-time exempt retired salaried employees located in the United States" and "15. All full-time Retired Employees . . . [who] (ii) are classified as full-time non-bargaining non-exempt employees."

A five-page "highlight summary" of exempt retiree benefits, first distributed to exempt retirees in 1973 and revised in 1975 to reflect the change from Blue Shield to Prudential, explained:

> Termination of Coverage
>
> A retiree's coverage will terminate on the date of his or her death or on the date the class of persons of which the retiree is a member ceases to be covered by the Program.
>
> • • • • •
>
> CURTISS-WRIGHT CORPORATION RESERVES THE RIGHT TO MODIFY, REVOKE, SUSPEND, CHANGE, OR TERMINATE THE PROGRAM IN WHOLE OR IN PART, AT ANY TIME.

App. 296-97, 428-29.

B. The Benefit Program: 1982-84

In 1982, CW began adding the following language to all letters, or other documents, involving the benefit plan: "Although the company fully expects to continue this benefit, you should be aware that unlike your retirement benefit which is a vested benefit, the retirement health care coverage is not a guaranteed benefit and therefore is subject to change or termination."

In 1983, concurrent with a change in carriers, a new SPD was issued and distributed to active employees. Plaintiffs and CW dispute whether the SPD was distributed to retirees. This SPD stated: "Coverage under this Plan will cease for retirees and their dependents upon the

termination of business operations of the facility from which they retired." In addition, it stated: "Although the Company expects this Plan to continue in its present form for an indeterminable period, this Plan is not a vested Plan and as such is subject to modification or termination at any time." CW contends that the provision allowing termination of retiree benefits in the event of a plant closure was intended as a clarification; plaintiffs claim it was an amendment.

In November 1983, CW announced that the Wood-Ridge plant would close and that in accordance with the provision in the 1983 SPD, retiree benefits would be cut off for non-bargaining unit employees who retired from the Wood-Ridge plant. This termination of benefits allegedly contradicted oral representations made to many of the retirees that their health benefits would continue for life.[1] The plaintiffs brought this suit in 1984 alleging breach of contract and violations of ERISA.

C. The District Court's Decision

After six years of litigation, the district court issued its decision in 1990 following a bench trial. The court found that CW had reserved the right to amend its plan. In particular, it referred to the express reservation of such a right in the 1976 Plan Constitution, although it noted that other documents also evidenced such a reservation. The district court further found that the term in the 1983 SPD permitting termination of retiree benefits upon closure of the plant at which they had worked was not a clarification of an already existing plan term, but rather was a new term. Accordingly, the district court held that this new term could only be effective if it had been added to the plan as an amendment.

The district court observed that, contrary to ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), the plan did not specify

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1. A number of witnesses, principally members of the plaintiff class, testified that they had been told, usually at their hiring or upon their retirement, that retiree health benefits would continue for life. CW witnesses disputed this.

procedures for amendment of the plan's terms. It further concluded that the manner in which the amendment was added to the plan in this case did not comply with any unpublished amendment procedures. As a result, the district court held that the amendment was invalid. It followed that the termination of plaintiffs' retiree benefits was contrary to the terms of the plan.

CW appeals from the district court's judgment against it; plaintiffs cross appeal from its determinations that CW reserved the right to amend the plan and that plaintiffs have not vested health benefits.[2]

II. CURTISS-WRIGHT'S APPEAL

A. Curtiss-Wright's Failure to Provide an Amendment Procedure

CW insists that: (1) its plan contained an amendment procedure in compliance with ERISA § 402(b)(3) and the 1983 amendment was adopted in accordance with that procedure; and (2) even if there was a violation of ERISA § 402(b)(3), striking a plan term is not an appropriate remedy for a violation of that subsection.

1. Was ERISA § 402(b)(3) Violated?

The provision of CW's plan relating to amendments is the statement in the Constitution and other documents that "[t]he Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the plan." CW contends that this suffices to satisfy the requirements of § 402(b)(3) which provides in part that: "Every employee benefit plan shall— . . . (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan . . . ." 29 U.S.C. § 1102(b)(3) (1988). We disagree.

A simple reservation of a right to amend is not the same as a "procedure for amending [the] plan"; nor does it

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2. We exercise appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291. The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(f).

provide a procedure "identifying the persons who have authority to amend the plan." A primary purpose of § 402(b)(3) is to ensure that all interested parties will know how a plan may be altered and who may make such alterations. Only if they know this information will they be able to determine with certainty at any given time exactly what the plan provides. The reservation in the CW plan does not accomplish these objectives, and acceptance of CW's argument would render requirements of § 402(b)(3) essentially meaningless.

CW cites *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990) in support of its position. In *Huber*, we concluded that a plan provision stating that "the Trustees may amend or modify this plan in whole or in part" specified an acceptable amendment procedure; namely "modification by the Trustees" in a context where amendments had been formally adopted by resolutions at a regularly constituted board meeting in accordance with the established process of the trustees. *Id.* at 106. CW argues by analogy that there was an acceptable amendment procedure specified here; namely, modification by the Company. Section 402(b)(3) states, however, that the procedure provided by the plan must permit the identification of the persons who have the authority to modify the plan; "the Trustees" clearly identifies the authorized persons, "the Company" does not. An individual reading the *Huber* plan could recognize the provision in question as describing a specific procedure for amending the plan; here, one is unable to tell what individuals or bodies within the Company could promulgate an effective amendment. Had the CW plan stated that the plan could be modified by the "Board of Directors," rather than "the Company," then *Huber* might provide an appropriate analogy.[3]

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3. Even if we were willing to equate "by the Company" with "by the board of directors," the record here does not indicate that the 1983 amendment was adopted by CW's board. While Judge Roth agrees with our conclusion that the amendment to the plan was ineffective, she does not agree with our reasoning on this point. Instead, Judge Roth believes that action taken by "the Company" means action taken by the board of directors or whomever of the company has the authority to take such

We conclude that *Huber* is distinguishable. We agree with the district court that CW's plan was in violation of § 402(b)(3).[4]

2. *Does a Violation of § 402(b)(3) Warrant Striking the Purported Amendment?*

In at least three previous cases, we have noted that a violation of § 402(b)(3) *might* prevent any purported amendment from taking effect, but we have expressly declined to decide that question. *See, e.g., Deibler v. Local Union 23*, 973 F.2d 206, 210 n.7 (3d Cir. 1992) ("[A]rguably, ... a plan cannot be amended unless and until an amendment procedure is added to the plan and complied with.") (quoting *Frank v. Colt Industries, Inc.*, 910 F.2d 90, 98 (3d Cir. 1990), citing *Hozier v. Midwest Fasteners, Inc.*,

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action under the corporation law of the state of incorporation of the company in question. As CW is a Delaware corporation, Judge Roth would consider action by "the Company" to be action by the board of directors pursuant to 8 Del. C. § 141(a): "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." Thus the amendment in question here was ineffective because neither CW's board nor any other person or entity within CW with the power to act on behalf of "the Company" ratified it.

4. CW argues that the "amendment procedure" (i.e. modification by the Company) was effectively complied with since agents of the company added the amendment in writing to the plan. It notes that this was not an informal or unwritten plan amendment of the type invalidated in cases like *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990). In addition, the Company's intent to amend was clear, unlike in *Frank v. Colt Industries, Inc.*, 910 F.2d 90 (3d Cir. 1990). Nevertheless, while a written amendment incorporated into the plan's terms and a clear intent to amend may be necessary conditions to a successful amendment, they are not sufficient. ERISA § 402(b)(3) requires that a plan specify amendment procedures and those procedures must be complied with. While written incorporation of a new plan term into the preexisting plan documents may be necessary for employees to understand their rights vis-a-vis the new term, it is also important that employees understand how their rights may be modified in the future; this latter goal can only be accomplished if there are published, enforceable amendment procedures.

908 F.2d 1155, 1163 n.9 (3d Cir. 1990)). This case requires that we now reach that issue.

CW argues that the invalidation of the purported amendment due to the failure of CW to comply with § 402(b)(3) would be inconsistent with our decision in *Hozier*. CW reads *Hozier* as holding that creation of "a substantive remedy for procedural violations of ERISA would contravene ERISA's statutory scheme" and that "procedural violations do not create rights to benefits in disregard of the plan terms." As a general matter, these propositions make sense. However, they are inapplicable here.

Hozier addresses the issue of whether a failure to comply with ERISA's notice or reporting requirements confers a right to receive benefits not provided for in the plan. There is something at stake here far more fundamental than a failure to comply with ERISA's procedural requirements pertaining to reporting and notice. The basic premise of ERISA is that a plan sponsor will be free to determine what benefits the plan will provide, but that once such a determination has been made, the benefits must be described in a written plan that is available to participants at any time upon request. Thereafter the participants are entitled to rely upon the plan document as defining the benefits currently being provided. Unless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan. It is in this way that ERISA provides certainty and protects participants against frustration of their legitimate expectations.

Unlike the situation in *Hozier* where the plaintiffs sought benefits not provided for in the plan, the plaintiffs' right to benefits in this case is derived exclusively from the terms of the plan; all the district court did was enforce the plan as written. The case law expressly recognizes that amendments which are not adopted substantially in accordance with a plan's amendment procedures are ineffective to alter the terms of a plan. *See, e.g., Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 255 (7th Cir. 1991); *Frank*, 910 F.2d at 98 ("Where a

plan has complied with ERISA by setting forth a method for accomplishing amendment, of course each putative amendment will be evaluated with reference to that method."). The same result is required where there are no amendment procedures at all. To hold otherwise would place those who violate § 402(b)(3) by including no procedure for amendment in a plan in a better position than those who comply with that requirement and would thereby discourage employers from complying with § 402(b)(3).

We therefore hold that the absence of an amendment procedure in CW's plan documents renders invalid its purported 1983 amendment allowing termination of plaintiffs' benefits. Contrary to CW's suggestion that such a holding will "undermine the integrity of the plan documents," we conclude that such a holding is necessary to assure the integrity of those documents.

By so holding, we do not suggest that a plan sponsor that reserves a right to amend its plan but neglects to include a provision complying with § 403(b)(3) is forever foreclosed from effectively utilizing its reserved power. The congressional scheme embodied in ERISA will be best served by a rule that an amendment designed solely to bring a plan into compliance with § 403(b)(3) can be effectively adopted by formal action of those who possess the sponsor's final management authority, in the case of CW by formal action of its board of directors. However, unless and until CW's board thus brings its plan into compliance and thereafter a further amendment terminating plaintiffs' benefits is adopted in accordance with the procedures thus designated, plaintiffs are entitled to receive the benefits specified in the plan.[5]

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5. Our holding here should not be construed to extend beyond a situation in which a plan sponsor amends the plan in a fashion which is advantageous to the sponsor's interest and in which the beneficiaries of the plan later challenge that amendment. We do not attempt to encompass in this decision other factual scenarios under which an amendment might be challenged.

B. Curtiss-Wright's Right to Terminate Benefits

Alternatively, CW suggests that we should sustain the November 1983 announcement as a termination of its entire welfare benefit plan and the institution of a new plan without benefits for the retirees of the Wood-Ridge plant. It points out that it reserved the right to terminate its plan as well as to amend it and that § 402(b)(3)'s requirement of a plan provision specifying a process for amendments does not apply to plan terminations. Because CW could have terminated its entire plan without implicating § 402(b)(3) and could then have instituted a new plan without benefits for the Wood-Ridge retirees, CW insists that it should be held to have accomplished the same result in "one step rather than two." We are unpersuaded.

CW's alternative theory will simply not fit the facts of this case. The record is devoid of any evidence that anyone at CW, much less a body having authority to terminate the plan, gave any consideration whatever to the business, public relations, tax or other legal implications of doing so. Moreover, after the announcement, no one at CW treated it as effecting a termination of the plan. No notice of plan termination was sent to all of the plan's participants, for example, as would have been required by ERISA if CW had intended to terminate it. 29 U.S.C. § 1024(b)(1). Most important, it is incumbent on us to look at the economic reality of transactions involving a ERISA plans. To characterize the November 1983 announcement as a termination of CW's welfare benefit plan would be to ignore the reality of the matter. That announcement was nothing more than an application to the Wood-Ridge plant of the 1982 plan amendment, an amendment that CW regarded as only a "clarification" of a continuing plan.

We are confident that the drafters of § 402(b)(3) would view the situation before us as one involving an attempted amendment to the plan in 1982, an amendment that could be effected only in a manner consistent with the requirements of that section. We are not disposed to indulge in a legal fiction in order to sanction an end run around the safeguards Congress there imposed.

III. PLAINTIFFS' CROSS-APPEAL

A. Reservation of Right to Amend

Turning to the cross-appeal, plaintiffs argue that the district court erred in concluding that CW reserved the right to amend its plan. They note that the district court, in so concluding, relied heavily on the reservation language contained in the Plan Constitution. Plaintiffs then stress that the Constitution, by its terms, facially refers only to "employees," not retirees. They further point out that one of CW's witnesses gave testimony susceptible of an interpretation that the Constitution was understood not to apply to the Blue Cross hospitalization program. Thus, according to the plaintiffs, the district court's conclusion about CW's reservation of a right to amend is without record support.

The district court understandably declined to hold that the Constitution and other plan documents were unambiguous as a matter of law. It held a trial in order to put itself in a position to consider all available evidence bearing on the sponsor's intent, the participants' reasonable understanding, and the past practice of the parties. Having considered all of this evidence, the district court made a finding of fact, in accordance with the teachings of *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992), on whether the power to amend had been reserved. We may not disturb that finding unless, viewed in the context of all of the evidence, it is clearly erroneous. We decline to so characterize it.

First, while it is true that the Constitution does not specifically refer to retired employees, there is ample support for the district court's understanding of that document. On its face, the Constitution refers only to employees. It defines employees as individuals who are "intended to be employed for one thousand or more hours in a calendar year or a period of twelve months from an employee's date of hire." According to CW and its witnesses, the employee definition was meant only to distinguish between full-time and part-time employees and was understood to include those employees who had retired

from full-time employment. Moreover, such an intent is reflected in several contemporary documents and is confirmed by the practice of the parties in the administration of the plan. Indeed, it was stipulated by the parties that retiree benefits were provided and administered in accordance with the framework established by the Constitution. Finally, CW's witnesses testified that when retirees asked to see plan documents they would be shown the Constitution as well as other documents.

Moreover, while the district court relied upon the Constitution, it relied as well on the clear and express reservation of the right to amend contained in every SPD following 1979 and in the summary of exempt retiree benefits first distributed in 1973 and revised in 1975.

B. Right to Lifetime Benefits

Plaintiffs acknowledge that the vesting requirements of ERISA do not apply to retiree health benefits. They correctly point out, however, that a sponsor can voluntarily create vested retiree health benefits, and they insist that CW did so. More particularly, they "contend that the Court below erred in failing to recognize that the documents in this case, when considered in light of all the surrounding evidence, created a non-terminable right to receive retiree health insurance benefits for so long as Curtiss-Wright Corporation maintains a post-retirement health insurance program." Plaintiffs' Reply Brief, p. 7. It is apparent from the plaintiffs' brief that they regard this argument as being independent of the preceding argument that the court erred in finding a reserved right to amend. It seems to us, however, that our conclusion in the preceding section is a complete answer to this argument. Even if the plan contained unambiguous assurances that all retirees would have health insurance benefits for life so long as CW maintained a post-retirement health insurance program, the general reserved right to amend the terms of the plan in whole or in part would render the right of any retiree or group of retirees terminable by the adoption of a legally effective amendment.[6]

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6. Contrary to plaintiffs' suggestion, this case is unlike *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992). The issue in that

As we understand plaintiffs' briefs, they seek to avoid the effect of the court's finding of a reserved right to amend by implying that a general right to amend somehow does not authorize an amendment like the one CW purported to adopt in 1983. They explain:

> ... the Court's determination that the Curtiss-Wright Post-retirement health insurance program was amendable did not address the issue of whether a general right to amend the Plan in whole or in part included a right to alter the classes of participants to eliminate benefits for some but not all participants based on a criteria that had never before been set forth as a determinative factor, i.e. whether the plant where someone last worked was still a functioning plant or had been closed.

Plaintiffs' Reply Brief, pp. 7-8.

While the court may not have expressly addressed this issue, it is apparent from the court's opinion that it properly decided it in CW's favor. One important and proper purpose of reserving a general right to amend is to permit the conditioning or cessation of any participants' benefits not vested by virtue of the mandate of ERISA in ways not originally foreseen in order to meet unanticipated changes of circumstance.[7]

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case was whether the arguably limited right of amendment reserved in that Plan was broad enough to authorize the amendment that the sponsor had adopted. Here, the right found by the district court to have been reserved was a general right to amend "in whole or in part, any or all provisions of the Plan." App. 547-48.

7. Plaintiffs' reliance on 29 U.S.C. § 1022(a)(1) is therefore misplaced. Although SPDs, under the requirements of that section, must state the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," they cannot state specific circumstances that are not part of the plan's terms but could hypothetically be added to the plan in the future through a valid amendment. On a similar note, at oral argument plaintiffs relied on our recent decisions in *Fisher v. Philadelphia Elec. Co.*, 994 F.2d 130 (3d Cir. 1993) and *Kurz v. Philadelphia Elec. Co.*, 994 F.2d 136 (3d Cir. 1993). These cases are, however, distinguishable. There, a material issue of fact existed as to

IV. CONCLUSION

The judgment of the district court will be affirmed.

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Clerk of the United States Court of Appeals
for the Third Circuit

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whether agents of the plan administrator had made affirmative misrepresentations to plan participants, i.e., telling them that the company was not considering an early retirement plan when in fact it was. However, we cautioned that "ERISA does not impose a 'duty of clairvoyance' on fiduciaries" and that "[a]n ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan." *Fisher*, 994 F.2d at 135.

Appendix B

Opinion of the Court of Appeals for the Third Circuit
(December 28, 1993; vacated March 3, 1994)

Filed December 28, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 92-5695 and 92-5710

FRANK C. SCHOONEJONGEN; WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated

v.

CURTISS-WRIGHT CORPORATION

Appellant

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 84-04542)

FRANK C. SCHOONEJONGEN; WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated

v.

CURTISS-WRIGHT CORPORATION

Frank C. Schoonejongen, Wesley L. Losson, John S. Dunning, William Martone, William V. Hanzalek, Edward F. Ziek, Melvin Deblock, Joseph Colquhoun, Joseph Majerscak, Gerard

Abbamont, and Olga Wolsey, on their own behalf and on behalf of the class of persons they represent,

Appellants

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 84-04542)

Argued September 10, 1993

Before: STAPLETON, ROTH and LEWIS, *Circuit Judges*

(Opinion Filed December 28, 1993)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

This appeal and cross-appeal involve a controversy precipitated by defendant Curtiss-Wright's (CW's) termination of health insurance benefits for former employees who had retired from a plant in Wood-Ridge New Jersey. The district court found that CW had reserved the right to amend its benefits plan to allow termination of benefits, but that CW had violated ERISA § 402(b)(3), 29 U.S.C. § 1102(b), by failing to include an amendment procedure among the plan's provisions. The court concluded that the lack of an amendment procedure rendered invalid a purported amendment authorizing termination of plaintiffs' benefits. As a result, the district court entered a judgment in excess of $2 million in favor of the plaintiffs' class. It declined, however, to find a non-terminable lifetime right to benefits for the plaintiffs' class. We will affirm.

I. Factual Background

The facts are largely undisputed. CW owns a number of industrial plants. One, in Wood-Ridge, New Jersey, opened during World War II and did defense-related work for forty years. Following a period of declining business, this plant closed in late 1983. At that time, CW notified a class of individuals who had retired from the Wood-Ridge plant that their health benefits were being terminated.

In 1984, a number of retirees who had their benefits terminated brought this suit as a class action on behalf of "all those retired Wood-Ridge employees who were not members of the bargaining unit represented by the United Auto Workers at the time of their retirement and whose post-retirement medical benefits were terminated or denied on or about December 1, 1983." The complaint alleged that CW's termination of benefits was wrongful and that the plaintiffs had a vested right to retiree health benefits for life. Plaintiffs sought damages as well as declaratory and injunctive relief.

A. The Benefit Program: 1966-82

In 1966, CW established a post-retirement health benefits program for the Wood-Ridge facility. CW was the plan sponsor and administrator of the plan, as well as its sole source of funding. From 1966 to 1983, the benefits were provided by a succession of health insurance plans provided by several different carriers. Each time a plan terminated and a new one was initiated, notice was apparently sent to the plaintiffs.

From 1966 through 1970, Liberty Mutual provided the insurance benefits. During this period two booklets were sent to retirees stating that benefits would terminate upon death or "if the Group Policy terminates." From 1971 through 1972, Prudential was the insurance carrier for retiree health benefits. Apparently, little, if anything, was provided during this period in the way of documentation. From 1973 through 1974, Blue Cross/Blue Shield provided benefits and CW sent retirees a letter summarizing those benefits. The letter stated that coverage would terminate upon death or "the date the class of persons of which the retiree is a member ceases to be covered by the program" and also stated that CW "reserves the right to modify, revoke, suspend, change, or terminate the program, in whole or in part." The term "class of persons of which the retiree is a member" was not defined. However, the contract between CW and Blue Cross/Blue Shield included in the classification of employees eligible for benefits: "All full-time salaried non-bargaining exempt and non-exempt Employees retired prior to January 1, 1973" and "All full-time salaried, non-bargaining exempt Employees retired on or after January 1, 1973."

In September, 1976, CW established an ERISA plan in accordance with the recently enacted ERISA statute. The plan had a written Constitution and Trust Agreement. The Constitution provided in part that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." It also provided that "the Company reserves the right to terminate the Plan established hereby for any reason at any time." The Constitution did not specify any particular benefits but simply incorporated any "plan or

plans" CW might "from time to time adopt." Also at that time, CW changed the manner in which it provided benefits: it began to self-insure, at least with respect to the medical-surgical benefits, and contracted with various carriers to administer the program.

In accordance with ERISA's requirements, Summary Annual Reports (SARs) were provided to plan participants. Starting in 1979, CW added the following reservation language to these SARs: "The company expects and intends to continue this plan indefinitely, but reserves the right to discontinue or amend it."

Plaintiffs claim that from 1976 through 1983, although active employees received Summary Plan Descriptions (SPDs), retirees did not. CW insists that SPDs were sent to retirees. In any event, the 1976 SPD, which was prepared by CW and Prudential and not replaced until 1983, provided in part: "When your employment terminates, or you cease to be a member of a class eligible for insurance under any part of the plan, your insurance under that part of the plan will cease. . . . Your insurance under the group policy will also terminate upon discontinuance of the group policy." Nothing in the SPD defined "class," although the underlying agreement between CW and Prudential listed sixteen classes of employees including: "14. All full-time exempt retired salaried employees located in the United States" and "15. All full-time Retired Employees . . . [who] (ii) are classified as full-time non-bargaining non-exempt employees."

A five-page "highlight summary" of exempt retiree benefits, first distributed to exempt retirees in 1973 and revised in 1975 to reflect the change from Blue Shield to Prudential, explained:

> Termination of Coverage
>
> A retiree's coverage will terminate on the date of his or her death or on the date the class of persons of which the retiree is a member ceases to be covered by the Program.
>
> • • • • •
>
> CURTISS-WRIGHT CORPORATION RESERVES THE RIGHT TO MODIFY, REVOKE, SUSPEND, CHANGE,

OR TERMINATE THE PROGRAM IN WHOLE OR IN PART, AT ANY TIME.

App. 296-97, 428-29.

B. The Benefit Program: 1982-84

In 1982, CW began adding the following language to all letters, or other documents, involving the benefit plan: "Although the company fully expects to continue this benefit, you should be aware that unlike your retirement benefit which is a vested benefit, the retirement health care coverage is not a guaranteed benefit and therefore is subject to change or termination."

In 1983, concurrent with a change in carriers, a new SPD was issued and distributed to active employees. Plaintiffs and CW dispute whether the SPD was distributed to retirees. This SPD stated: "Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired." In addition, it stated: "Although the Company expects this Plan to continue in its present form for an indeterminable period, this Plan is not a vested Plan and as such is subject to modification or termination at any time." CW contends that the provision allowing termination of retiree benefits in the event of a plant closure was intended as a clarification; plaintiffs claim it was an amendment.

In November 1983, CW announced that the Wood-Ridge plant would close and that in accordance with the provision in the 1983 SPD, retiree benefits would be cut off for non-bargaining unit employees who retired from the Wood-Ridge plant. This termination of benefits allegedly contradicted oral representations made to many of the retirees that their health benefits would continue for life.[1] The plaintiffs brought this suit in 1984 alleging breach of contract and violations of ERISA.

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1. A number of witnesses, principally members of the plaintiff class, testified that they had been told, usually at their hiring or upon their retirement, that retiree health benefits would continue for life. CW witnesses disputed this.

C. *The District Court's Decision*

After six years of litigation, the district court issued its decision in 1990 following a bench trial. The court found that CW had reserved the right to amend its plan. In particular, it referred to the express reservation of such a right in the 1976 Plan Constitution, although it noted that other documents also evidenced such a reservation. The district court further found that the term in the 1983 SPD permitting termination of retiree benefits upon closure of the plant at which they had worked was not a clarification of an already existing plan term, but rather was a new term. Accordingly, the district court held that this new term could only be effective if it had been added to the plan as an amendment.

The district court observed that, contrary to ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), the plan did not specify procedures for amendment of the plan's terms. It further concluded that the manner in which the amendment was added to the plan in this case did not comply with any unpublished amendment procedures. As a result, the district court held that the amendment was invalid. It followed that the termination of plaintiffs' retiree benefits was contrary to the terms of the plan.

CW appeals from the district court's judgment against it; plaintiffs cross appeal from its determinations that CW reserved the right to amend the plan and that plaintiffs have no vested health benefits.[2]

II. *Curtiss-Wright's Appeal*

A. *Curtiss-Wright's Right to Terminate Benefits*

CW does not dispute before us the district court's finding that its plan, prior to 1983, contained no provision specifically authorizing the plan to cease paying health benefits to the plaintiffs upon the closing of the plant where

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2. We exercise appellate jurisdiction over this case pursuant to 28 U.S.C. § 1291. The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(f).

they had been employed. CW argues, however, that it was authorized to terminate the health benefits of the retirees from the Wood-Ridge plant in 1983 because the plan documents authorized it to terminate the plan at any time, and this authority necessarily implied the authority to terminate any portion of the plan. Because CW could have terminated the entire plan, and then initiated a new plan without benefits for the Wood-Ridge retirees, CW insists that it should be held to have accomplished the same result in "one step rather than two." We are unpersuaded.

As CW stresses, the district court found that CW had reserved the right to amend the plan, as well as to terminate it. Thus, if the district court's findings be accepted, there is no question but that CW had the power to terminate non-vested benefits, provided it followed the proper procedures. CW's argument that its reservation of the right to terminate the plan implies a right to terminate part of the plan is therefore beside the point. The district court agreed that CW could terminate plaintiffs' benefits; the only question was what CW had to do in order to terminate these benefits.

In order to have effectively terminated its plan, CW would have had to comply with the plan termination procedures mandated by ERISA and the ERISA regulations. *See, e.g.*, 29 U.S.C. 1341(b); 53 Fed. Reg. 1904. In order to have effectively amended its plan, CW would have had to adopt an amendment in a manner consistent with the amendment requirements found in § 402 of ERISA. 29 U.S.C. § 1102. We decline to adopt CW's suggestion that its right to terminate the plan gives it the right to terminate certain benefits without complying with *either* the termination or amendment procedures.

If a plan is to cease paying benefits to a class of participants upon the happening of a certain event, the plan must be able to point to some authority for such a cessation in the terms of the plan.[3] Prior to 1983, the terms

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3. We agree with the district court that a reservation of a right to terminate or amend a plan is not the same as a plan term providing that a class of participants may have their benefits terminated upon the happening of a contingent event. *Cf.* 29 U.S.C. § 1022(b) (stating that SPDs must include a statement of "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits").

of CW's plan concededly did not provide that a retiree's health benefits could terminate upon the closure of the plant from which the individual retired. It follows that the plan had no authority to cease paying plaintiffs' health benefits in 1983 absent an effective amendment or an effective termination having the effect of eliminating those benefits.[4] CW does not purport to have complied with ERISA's requirements for plan termination. Accordingly, the crucial issue, as the district court held, was whether CW's plan was effectively amended in that year.

B. Failure to Provide an Amendment Procedure

CW insists that: (1) its plan contained an amendment procedure in compliance with ERISA § 402(b)(3) and the 1983 amendment was adopted in accordance with that procedure; and (2) even if there was a violation of ERISA § 402(b)(3), striking a plan term is not an appropriate remedy for a violation of that subsection.

1. Was ERISA § 402(b)(3) Violated?

The provision of CW's plan relating to amendments is the statement in the Constitution and other documents that "[t]he Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the plan." CW contends that this suffices to satisfy the requirements of § 402(b)(3) which provides in part that: "Every employee benefit plan shall— . . . (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan . . . ." 29 U.S.C. § 1102(b)(3) (1988). We disagree.

A simple reservation of a right to amend is not the same as a "procedure for amending [the] plan"; nor does it provide a procedure "identifying the persons who have

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4. It is possible that a limited termination of benefits could be treated as a partial termination of the plan under certain circumstances. *See, e.g.*, Stephen R. Bruce, *Pension Claims: Rights and Obligations*, 563-83 (2d ed. 1993); I.R.C. § 411(d)(3) (1988). There is, however, no indication here that CW sought to treat its action as a partial termination or to comply with procedures regarding a partial termination.

authority to amend the plan." A primary purpose of § 402(b)(3) is to ensure that all interested parties will know how a plan may be altered and who may make such alterations. Only if they know this information will they be able to determine with certainty at any given time exactly what the plan provides. The reservation in the CW plan does not accomplish these objectives, and acceptance of CW's argument would render requirements of § 402(b)(3) essentially meaningless.

CW cites *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990) in support of its position. In *Huber*, we concluded that a plan provision stating that "the Trustees may amend or modify this plan in whole or in part" specified an acceptable amendment procedure; namely "modification by the Trustees" in a context where amendments had been formally adopted by resolutions at a regularly constituted board meeting in accordance with the established process of the trustees. *Id.* at 106. CW argues by analogy that there was an acceptable amendment procedure specified here; namely, modification by the Company. Section 402(b)(3) states, however, that the procedure provided by the plan must permit the identification of the persons who have the authority to modify the plan; "the Trustees" clearly identifies the authorized persons, "the Company" does not. An individual reading the *Huber* plan could recognize the provision in question as describing a specific procedure for amending the plan; here, one is unable to tell what individuals or bodies within the Company could promulgate an effective amendment. Had the CW plan stated that the plan could be modified by the "Board of Directors," rather than "the Company," then *Huber* might provide an appropriate analogy.[5]

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5. Even if we were willing to equate "by the Company" with "by the board of directors," the record here does not indicate that the 1983 amendment was adopted by CW's board. While Judge Roth agrees with our conclusion that the amendment to the plan was ineffective, she does not agree with our reasoning on this point. Instead, Judge Roth believes that action taken by "the Company" means action taken by the board of directors or whomever of the company has the authority to take such action under the corporation law of the state of incorporation of the

We conclude that *Huber* is distinguishable. We agree with the district court that CW's plan was in violation of § 402(b)(3).[6]

2. *Does a Violation of § 402(b)(3) Warrant Striking the Purported Amendment?*

In at least three previous cases, we have noted that a violation of § 402(b)(3) *might* prevent any purported amendment from taking effect, but we have expressly declined to decide that question. *See, e.g., Deibler v. Local Union 23*, 973 F.2d 206, 210 n.7 (3d Cir. 1992) ("[A]rguably, . . . a plan cannot be amended unless and until an amendment procedure is added to the plan and complied with.") (quoting *Frank v. Colt Industries, Inc.*, 910 F.2d 90, 98 (3d Cir. 1990), citing *Hozier v. Midwest Fasteners, Inc.*,

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company in question. As CW is a Delaware corporation, Judge Roth would consider action by "the Company" to be action by the board of directors pursuant to 8 Del. C. § 141(a): "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." Thus the amendment in question here was ineffective because neither CW's board nor any other person or entity within CW with the power to act on behalf of "the Company" ratified it.

6. CW argues that the "amendment procedure" (i.e. modification by the Company) was effectively complied with since agents of the company added the amendment in writing to the plan. It notes that this was not an informal or unwritten plan amendment of the type invalidated in cases like *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990). In addition, the Company's intent to amend was clear, unlike in *Frank v. Colt Industries, Inc.*, 910 F.2d 90 (3d Cir. 1990). Nevertheless, while a written amendment incorporated into the plan's terms and a clear intent to amend may be necessary conditions to a successful amendment, they are not sufficient. ERISA § 402(b)(3) requires that a plan specify amendment procedures and those procedures must be complied with. While written incorporation of a new plan term into the preexisting plan documents may be necessary for employees to understand their rights vis-a-vis the new term, it is also important that employees understand how their rights may be modified in the future; this latter goal can only be accomplished if there are published, enforceable amendment procedures.

908 F.2d 1155, 1163 n.9 (3d Cir. 1990)). This case requires that we now reach that issue.

CW argues that the invalidation of the purported amendment due to the failure of CW to comply with § 402(b)(3) would be inconsistent with our decision in *Hozier*. CW reads *Hozier* as holding that creation of "a substantive remedy for procedural violations of ERISA would contravene ERISA's statutory scheme" and that "procedural violations do not create rights to benefits in disregard of the plan terms." As a general matter, these propositions make sense. However, they are inapplicable here.

Hozier addresses the issue of whether a failure to comply with ERISA's notice or reporting requirements confers a right to receive benefits not provided for in the plan. There is something at stake here far more fundamental than a failure to comply with ERISA's procedural requirements pertaining to reporting and notice. The basic premise of ERISA is that a plan sponsor will be free to determine what benefits the plan will provide, but that once such a determination has been made, the benefits must be described in a written plan that is available to participants at any time upon request. Thereafter the participants are entitled to rely upon the plan document as defining the benefits currently being provided. Unless and until the written plan is altered in a manner, and by a person or persons, authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan. It is in this way that ERISA provides certainty and protects participants against frustration of their legitimate expectations.

Unlike the situation in *Hozier* where the plaintiffs sought benefits not provided for in the plan, the plaintiffs' right to benefits in this case is derived exclusively from the terms of the plan; all the district court did was enforce the plan as written. The case law expressly recognizes that amendments which are not adopted substantially in accordance with a plan's amendment procedures are ineffective to alter the terms of a plan. *See, e.g., Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 255 (7th Cir. 1991); *Frank*, 910 F.2d at 98 ("Where a

plan has complied with ERISA by setting forth a method for accomplishing amendment, of course each putative amendment will be evaluated with reference to that method."). The same result is required where there are no amendment procedures at all. To hold otherwise would place those who violate § 402(b)(3) by including no procedure for amendment in a plan in a better position than those who comply with that requirement and would thereby discourage employers from complying with § 402(b)(3).

We therefore hold that the absence of an amendment procedure in CW's plan documents renders invalid its purported 1983 amendment allowing termination of plaintiffs' benefits. Contrary to CW's suggestion that such a holding will "undermine the integrity of the plan documents," we conclude that such a holding is necessary to assure the integrity of those documents.

By so holding, we do not suggest that a plan sponsor that reserves a right to amend its plan but neglects to include a provision complying with § 403(b)(3) is forever foreclosed from effectively utilizing its reserved power. The congressional scheme embodied in ERISA will be best served by a rule that an amendment designed solely to bring a plan into compliance with § 403(b)(3) can be effectively adopted by formal action of those who possess the sponsor's final management authority, in the case of CW, by formal action of its board of directors. However, unless and until CW's board thus brings its plan into compliance and thereafter a further amendment terminating plaintiffs' benefits is adopted in accordance with the procedures thus designated, plaintiffs are entitled to receive the benefits specified in the plan.[7]

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7. Our holding here should not be construed to extend beyond a situation in which a plan sponsor amends the plan in a fashion which is advantageous to the sponsor's interests and in which the beneficiaries of the plan later challenge that amendment. We do not attempt to encompass in this decision other factual scenarios under which an amendment might be challenged.

III. Plaintiffs' Cross-Appeal

A. Reservation of Right to Amend

Turning to the cross-appeal, plaintiffs argue that the district court erred in concluding that CW reserved the right to amend its plan. They note that the district court, in so concluding, relied heavily on the reservation language contained in the Plan Constitution. Plaintiffs then stress that the Constitution, by its terms, facially refers only to "employees," not retirees. They further point out that one of CW's witnesses gave testimony susceptible of an interpretation that the Constitution was understood not to apply to the Blue Cross hospitalization program. Thus, according to the plaintiffs, the district court's conclusion about CW's reservation of a right to amend is without record support.

The district court understandably declined to hold that the Constitution and other plan documents were unambiguous as a matter of law. It held a trial in order to put itself in a position to consider all available evidence bearing on the sponsor's intent, the participants' reasonable understanding, and the past practice of the parties. Having considered all of this evidence, the district court made a finding of fact, in accordance with the teachings of *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992), on whether the power to amend had been reserved. We may not disturb that finding unless, viewed in the context of all of the evidence, it is clearly erroneous. We decline to so characterize it.

First, while it is true that the Constitution does not specifically refer to retired employees, there is ample support for the district court's understanding of that document. On its face, the Constitution refers only to employees. It defines employees as individuals who are "intended to be employed for one thousand or more hours in a calendar year or a period of twelve months from an employee's date of hire." According to CW and its witnesses, the employee definition was meant only to distinguish between full-time and part-time employees and was understood to include those employees who had retired

from full-time employment. Moreover, such an intent is reflected in several contemporary documents and is confirmed by the practice of the parties in the administration of the plan. Indeed, it was stipulated by the parties that retiree benefits were provided and administered in accordance with the framework established by the Constitution. Finally, CW's witnesses testified that when retirees asked to see plan documents they would be shown the Constitution as well as other documents.

Moreover, while the district court relied upon the Constitution, it relied as well on the clear and express reservation of the right to amend contained in every SPD following 1979 and in the summary of exempt retiree benefits first distributed in 1973 and revised in 1975.

B. Right to Lifetime Benefits

Plaintiffs acknowledge that the vesting requirements of ERISA do not apply to retiree health benefits. They correctly point out, however, that a sponsor can voluntarily create vested retiree health benefits, and they insist that CW did so. More particularly, they "contend that the Court below erred in failing to recognize that the documents in this case, when considered in light of all the surrounding evidence, created a non-terminable right to receive retiree health insurance benefits for so long as Curtiss-Wright Corporation maintains a post-retirement health insurance program." Plaintiffs' Reply Brief, p. 7. It is apparent from the plaintiffs' brief that they regard this argument as being independent of the preceding argument that the court erred in finding a reserved right to amend. It seems to us, however, that our conclusion in the preceding section is a complete answer to this argument. Even if the plan contained unambiguous assurances that all retirees would have health insurance benefits for life so long as CW maintained a post-retirement health insurance program, the general reserved right to amend the terms of the plan in whole or in part would render the right of any retiree or group of retirees terminable by the adoption of a legally effective amendment.[8]

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8. Contrary to plaintiffs' suggestion, this case is unlike *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992). The issue in that

As we understand plaintiffs' briefs, they seek to avoid the effect of the court's finding of a reserved right to amend by implying that a general right to amend somehow does not authorize an amendment like the one CW purported to adopt in 1983. They explain:

> . . . the Court's determination that the Curtiss-Wright Post-retirement health insurance program was amendable did not address the issue of whether a general right to amend the Plan in whole or in part included a right to alter the classes of participants to eliminate benefits for some but not all participants based on a criteria that had never before been set forth as a determinative factor, i.e. whether the plant where someone last worked was still a functioning plant or had been closed.

Plaintiffs' Reply Brief, pp. 7-8.

While the court may not have expressly addressed this issue, it is apparent from the court's opinion that it properly decided it in CW's favor. One important and proper purpose of reserving a general right to amend is to permit the conditioning or cessation of any participants' benefits not vested by virtue of the mandate of ERISA in ways not originally foreseen in order to meet unanticipated changes of circumstance.[9]

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case was whether the arguably limited right of amendment reserved in that Plan was broad enough to authorize the amendment that the sponsor had adopted. Here, the right found by the district court to have been reserved was a general right to amend "in whole or in part, any or all provisions of the Plan." App. 547-48.

9. Plaintiffs' reliance on 29 U.S.C. § 1022(a)(1) is therefore misplaced. Although SPDs, under the requirements of that section must state the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," they cannot state specific circumstances that are not part of the plan's terms but could hypothetically be added to the plan in the future through a valid amendment. On a similar note, at oral argument plaintiffs relied on our recent decisions in *Fisher v. Philadelphia Elec. Co.*, 994 F.2d 130 (3d Cir. 1993) and *Kurz v. Philadelphia Elec. Co.*, 994 F.2d 136 (3d Cir. 1993). These cases are, however, clearly distinguishable. There, a material issue of fact existed

IV. Conclusion

The judgment of the district court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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as to whether agents of the plan administrator had made affirmative misrepresentations to plan participants, i.e., telling them that the company was not considering an early retirement plan when in fact it was. However, we cautioned that "ERISA does not impose a 'duty of clairvoyance' on fiduciaries" and that "[a]n ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan." *Fisher*, 994 F.2d at 135.

Appendix C

Opinion of the District Court for the District of New Jersey after Trial (October 4, 1990)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 84-4542

FRANK C. SCHOONEJONGEN, et al.,

Plaintiffs,

—vs—

CURTISS-WRIGHT CORPORATION,

Defendant.

Newark, New Jersey
Tuesday, October 4, 1990

Before:

HONORABLE JOHN W. BISSELL,
United States District Judge

Appearances:

LEWIS, GREENWALD, KENNEDY, LEWIS,
CLIFTON & SCHWARTZ, ESQS.,
BY: THOMAS KENNEDY, ESQ.,
—and—
IRA CURE, ESQ.,
Attorneys for the Plaintiffs.

CARPENTER, BENNETT & MORRISSEY, ESQS.,
BY: ROSEMARY ALITO, ESQ.,
—and—
KEVIN DUFFY, ESQ.,
Attorneys for the Defendant.

AARON J. CARR, ESQ.,
Attorney for Defendant.

OPINION

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record of taken stenographically in the above entitled proceedings.

/s/ IRA N. RUBENSTEIN
Ira N. Rubenstein
Official Court Reporter

THE COURT: Initially for the record in this matter the Court incorporates, and by reference, the stipulated facts from the pretrial order appearing in paragraph two thereof, and because of that, need not recite a number of those facts specifically but they ought to be deemed incorporated.

The Court also notes by way of supplement to the stipulated facts, "its findings," with regard to the terminology appearing in several documents referred to at page 13 of its opinion of August 12, 1988. More particularly, they're summarized in the various expressions of the reservation of rights to terminate or amend the plan which, as the Court's Opinion today will reveal, the Court believes are effective to assert, establish and preserve those rights of amendment and termination to Curtiss-Wright.

While the specific documents and timing of those documents may be less than ideal, it is clear that Curtiss-Wright did, in fact, reserve a right to amend the Plan. In addition to the quoted portions appearing at page 13 of the Court's opinion of August 12, 1988, the Court notes as well that reserved right is expressly stated on the Plan's constitution (J-64) executed in 1976 which is an effective, adequate recitation of that right. Given the ERISA philosophy not to hastily construe a plan to create vested interest where there are none, that is in plans such as health benefit plans, the record would have to reveal by a preponderance of the evidence that in this case such benefits vested. Here they did not. At most, plaintiffs showed that a program was in place, benefits were there, and if not terminated or amended, they would remain throughout a retiree's retirement. But those benefits were not unchangeable.

The language of the plan around which this litigation has pivoted appears at page 32 of J-119, the origins and date of which are clearly a matter of public record. It is essentially the 1983 publication. That language, under a clear heading of Termination of Health Care Benefits, states and I quote:

"Coverage under this plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired."

With the termination of business operations at the Wood-Ridge facility, the defendant, Curtiss-Wright, invoked this provision to terminate these hospital, medical, surgical, sometimes collectively called health benefits, for the retirees who formed a member of plaintiff class.

This Court finds and determines that the addition to the plan of the language just quoted providing for a termination of benefits in the event of a plant closing constituted an amendment of the plan, not a clarification of existing terms as defendant contends. The language is a specific reference, triggered by a specific event, namely the District Court decision in *International Union, United Automobile Aerospace and Agricultural Implement Workers of America v. Yard-Man*. The

argument that the additional language was merely a clarification, or described a particular subset of persons already under an existing provision is unavailing, as consideration of the following exhibits shows.

The Court has reviewed in this context the exhibits recited by the plaintiff in oral argument and notes that particularly such exhibits as J-30, J-39 and J-53, do not support the contention of the defendant that the terminology providing for the termination of benefits for a "class of persons" can logically or otherwise be construed so that a class of persons is synonymous either in this case or generally with the retirees from the Wood-Ridge facility. The indications from those various exhibits, while the classes and classifications may vary within them, in no way support an argument that would make class of persons synonymous with the retirees of the Wood-Ridge plant.

Accordingly, the Court determines, as I've mentioned a moment ago, that the amended language about the cessation of benefits on termination of business operations at the facility from which one retires, cannot be deemed to be in any way a clarification or description of a subset of the so-called class of persons previously expressed in prior publications on the Plan as being a group subject to termination.

This Court finds that the Plan continues because it was not terminated. Other retirees, exempt and nonexempt, from other plants in operation are still covered by these benefits.

Accordingly, to summarize the first phase of this opinion, the 1983 addition, which I've quoted already, is indeed an amendment to the Plan.

The Court further determines that the amendment was not effectively promulgated. The reasons that the amendment is not effective include the following:

First, under ERISA Section 402(b)(3), 29 U.S.C. Section 1102(b)(3), a procedure for amending the plan must be provided in the Plan documents. In this case it wasn't.

Secondly, under *Huber v. Casablanca Industries*, and *Hozier v. Midwest Fasteners, Inc.*, two recent Slip Opinions

from the Third Circuit that have been referred to frequently throughout this litigation, a plan may not be amended by informal means. When a plan with such procedures is, in fact, amended, the effectiveness thereof will be evaluated by reference to those procedures. Let me restate that sentence.

When a plan with such procedures is amended, the effectiveness thereof will be evaluated by reference to those procedure such as they may have been.

I have already commented there were no written procedures to the amendment set forth in the evidence before this Court. The analysis might arguably stop there under the statute and under a permissible reading of *Huber* and *Hozier*. However, the Court has also considered in this case the testimony of Mr. Du Bois which suggests there may have been an unwritten procedure for amending the plan involving the submission to a certain executive committee which he described. However, as the defendant admits, even those procedures were not followed in the case of the 1983 amendatory language.

The argument before the Court that somehow or other a de facto compliance with those unpublished amendment procedures took place because of the membership of that committee and its knowledge of these events is completely unpersuasive particularly in the face of ERISA's requirements and underlying purpose. Indeed in this case the purported amendment was not even considered by Curtiss-Wright to be an amendment at all. Of course, I have ruled to the contrary. Here it was done as a matter of routine redrafting, and is therefore not effective. The Court must therefore look to the 1983 booklet without such amendment as the governing document. Strictly construed and so examined, this booklet, because of the ineffective purported amendment, once again J-119, does not contain a termination provision containing even the "class of persons" language. The Court therefore is left with a plan that has no provision for cessation of benefits on termination of class coverage. None of the three preceding paragraphs remaining effective on page 32 of J-119 are subject to such a construction. Secondly, however, even if the

earlier documents were to govern, these plaintiffs, the Wood-Ridge retirees, are not a "class of persons" for reasons previously stated.

In this Court's view that disposes of the essential issues before it. However, I wish to make perfectly clear, certain grounds on which this decision is not based because they were raised in the course of oral argument. This decision is not based on the analysis that if there is an amendment here, at best it operates as to plan number 508 leaving intact plans 502 and 504 for the benefit of the plaintiffs. Such a basis is unnecessary in light of the Court's decision that the amendment is ineffective in all respects. In addition, the Court agrees that plans numbered 502 and 504 were within and a duplication in part of the overall plan number 508.

Secondly, this decision is not based on the argument that J-119 is effective as to active employees only. It does indeed refer to retirees and the benefits which they will enjoy. In addition, notice of the critical and contested amendment materially affecting the retirees who are the present class was received as of November of 1983, a few months after the issuance of J-119.

By the way, in using the word "class" at that point, I'm referring to them as a class in this class action, once again having already determined they are not a "class of persons" within the terminology of the plan.

Thirdly, this Court does not nullify the amendment of 1983, which I have previously described, on the basis of any bad faith enactment on the brink of the closing of Wood-Ridge. The Court accepts the evidence of Carr and DuBois, though conflicting, as to who initiated the language that worked its way into the draft early in the lengthy evolution of J-119.

As stated at the outset of this Opinion, the Court is not agreeing with the plaintiff's argument that the Plan's constitution (J-64) cannot serve as an effective reservation of the defendant's right to amend. J-64 and J-54 were generated due to the enactment of ERISA, which is the underpinning of this

action. The constitution is an appropriate source of the reserve right to amend the plan, at least as early as 1976.

The Court will not issue any advisory opinion with respect to the response of this Court or any other tribunal if defendant were to immediately enact a formal procedure to amend the plan, and then follow it to effectuate the amendment it ineffectively attempted in 1983.

Given the Court's determination, however, that there is a right to amend, and given the determination that none of the plaintiffs established an entitlement to vested health benefits for life (rather, any such benefits, while they might endure through retirement, are still subject to amendment or termination), the Court will not issue an injunction barring any amendment to those benefits in the future. Instead, this Court is merely issuing a declaratory judgment that those benefits are currently in effect, and have been up to today's date.

As a final note, although the plaintiffs were earlier divided into subclasses for purposes of this case, this decision applies equally to all members of each subclass, and these distinctions between the plaintiffs are inapplicable as to the right to the declaratory relief which the Court has just enunciated.

Mr. Kennedy, I would ask if you would, please, to prepare a form of judgment reflecting the decision which the Court has reached.

I would like at the earliest opportunity, including right now, if you feel reasonably comfortable in doing so, to convene a conference with regard to we're we go from here particularly in terms of the assertion of claims.

On the other hand, if both sides feel that time for some personal consideration, reflection, both with the client and others is appropriate, that it would be better to convene such a conference at some time next week, I think I would accede to that.

Mr. Kennedy, do you have a preference?

MR. KENNEDY: Well, your Honor, I think some of that really depends on whether it is the intention of the defendant

to seek an interlocutory appeal with the judgment as to liability. I think we should know that before—

THE COURT: I understand; a Section 1292(b) certification or else an order from the Court under Rule 54, I believe that this partial judgment is to be deemed final for the purposes of appealability. I certainly would not, you know, would not forecast how to treat those.

Ms. Alito.

MS. ALITO: I'm certain we'll make those applications to your Honor.

THE COURT: Let's leave this thinking a little bit. I will be in touch with you if you're not in touch with me, sometime middle of next week because I feel Mr. Kennedy and everyone recognizes the case has been pending a long time even up to this point and I seriously want to consider what procedures might be employed for the purpose of moving ahead with the establishment of any individual entitlements.

Anything further at this time, Mr. Kennedy?

MR. KENNEDY: Your Honor, just like to note that perhaps there will be further time to do it but it is our intent to make a motion for interim attorney fees, an award based on the work we performed to date.

We would appreciate having the opportunity to have that matter placed before your Honor and resolved prior to the point of which the appeal is heard so that to the extent there are questions that flow not only from the decision as to liability but as to the decision that you reach in connection with attorneys' fees, they can be considered together so they may be resolved all at once.

THE COURT: You have that right and you know the motion schedule provided by our local rules. That's at the moment in your hands rather than in anyone else's.

Anything further at this time?

MR. KENNEDY: No, your Honor.

THE COURT: Ms. Alito?

MS. ALITO: No, your Honor.

THE COURT: All right. Thank you.

(Court adjourned.)

Appendix D

Opinion of the District Court on Motion for §1292(b) Certification (December 17, 1990)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 84-4542

FRANK C. SCHOONEJONGEN, et. al., on behalf of themselves and all others similarly situated,

Plaintiffs,

—v.—

CURTISS-WRIGHT CORPORATION,

Defendant.

OPINION

APPERANCES:

LEWIS, GREENWALD & KENNEDY
By: Nicholas F. Lewis, Esquire
355 Murray Hill Parkway
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(Attorneys for Plaintiffs)

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BISSELL, *District Judge*

This matter arises before the Court on the basis of defendant Curtiss-Wright's motion for certification pursuant to 28 U.S.C. § 1292(b), in order that it may appeal this Court's determination of liability issues in the case. Plaintiffs do not oppose the motion, and instead only request that the proceedings, including discovery for the damages phase of the trial (which has not yet been held), continue pending the appeal.

FACTS AND BACKGROUND

The facts have been extensively considered and expressed in prior opinions of this Court. References to them will be limited to those particularly pertinent to the present motion.

This Court, sitting without a jury, conducted a trial as to liability only and determined that defendant is liable to the plaintiffs (retirees from defendant's Wood-Ridge facility) for improperly terminating their post-retirement health benefits. In an oral opinion from the bench on October 4, 1990, this Court made several specific findings of relevance to this motion. First, the Court found that although the documents provided by the defendant to describe its retirement plan were less than clear, Curtiss-Wright did in fact reserve a right to amend the plan. This reservation is in the Constitution as well as numerous other contemporanous documents. Second, the Court found that the language concerning termination of plan

benefits at a plant closing constituted an amendment to the plan because this term was not originally a part of that plan. This language did not, as defendant contended, constitute merely a clarification of an existing provision. Next, the Court determined that the amendment was not effectively promulgated. Under ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), a procedure for amending the plan must be provided in the plan documents. It was not. Under *Huber v. Casablanca Industries*, (slip op. at Exh. A to Defendant's Br.), and *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990), the Third Circuit held that a plan may not be amended by informal means. When a plan with procedures is amended, the effectiveness of the amendment is determined by reference to those procedures. The Court also found that there was in existence a sort of informal procedure for amending the plan which also was not followed in this instance. Under any of the applicable plan documents, plaintiffs' benefits were never effectively terminated.

Defendant's Motion for Certification

Curtiss-Wright moves for certification under 28 U.S.C. § 1292(b) so that it may appeal this Court's determination as to liability only.

Defendant asserts that the holding of this Court as to its liability is dependent on three separate controlling questions of law:

> 1. Whether, as a matter of law, an employer's unfettered and expressly reserved right to terminate a welfare benefit plan at any time encompasses the right to terminate benefits for any particular group under the plan;
>
> 2. Whether the Court erroneously construed ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), to find that Curtiss-Wright had failed to comply with it;

3. Whether a procedural violation of § 402(b)(3) invalidates a plan amendment which the employer had the right to make and which was incorporated in writing in a formal plan document.

Defendant argues that there is a substantial basis for difference of opinion with respect to each of these questions and that appellate consideration of these questions of law at this time would materially advance the termination of this litigation. A summary of these arguments follows.

Defendant first argues that there is a substantial basis for a difference of opinion as to this Court's holding that Curtiss-Wright was required to amend the plan in order to terminate plaintiffs' benefits. (Defendant's Br. at 2-5). Essentially, defendants are making the argument that because they reserved the right to terminate the whole plan, they had the right to terminate a part (*i.e.*, plaintiffs' part) of the plan. In support of this argument, defendant relies on trust principles. Thus, Curtiss-Wright was not required to amend the plan in 1983 before lawfully terminating plaintiffs' benefits.

Next, defendant argues that there are substantial bases for difference of opinion on controlling issues of law with respect to the construction and application of ERISA § 402(b)(3) (which states: "Every employee benefit plan shall . . . provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan."). (Defendant's Br. at 5-18). There are two parts to this argument.

Defendant argues that this Court's construction of ERISA § 402(b)(3) to require Curtiss-Wright to follow a more formal procedure for plan amendment conflicts with the purpose of that section and with *Huber* (slip op. attached to Defendant's Br.). In *Huber*, the Third Circuit found that a plan did provide for a procedure, "Modification by the Trustees," and evaluated the amendment accordingly. (*Id.* at 46). Based on this and other cases, defendant argues that its reservation of the right to amend carries with it the inherent procedure

for amendment adequate to satisfy ERISA § 402(b)(3). (Defendant's Br. at 8-9). Defendant also contends that because the amendment was incorporated into a plan document, it complied with this procedure in a manner consistent both with plan documents and with the fundamental purpose of § 402(b)(3). (*Id.*, at 10).

The second portion of defendant's § 402(b)(3) argument is that even if it had not complied with that section, there is a substantial basis for a difference of opinion as to the Court's holding that a violation of that section invalidates the amendment. (*Id.* at 11-18). Based on *Hozier* and other cases, defendant argues that this Court's invalidation of the amendment, which was in plan documents, derogated the efficacy of having plan terms as set forth in plan documents. (*Id.* at 11). Defendant also argues that a violation of § 402(b)(3) is nothing more than a "procedural" violation, like a disclosure violation, which does not invalidate the terms of the plan. (*Id.* at 12).

Defendant next argues that there is no reason to hold this amendment invalid inasmuch as it makes no difference to employees whether the amendment was properly promulgated or not so long as they receive notice, in contrast to the situation where an employer gives no notice. (*Id.* at 13). Further, defendant argues that invalidating an amendment is only appropriate where the violation "threatens the fundamental integrity of the plan documents." (*Id.* at 14). Defendant also argues that permitting invalidation of an amendment which has been incorporated into a formal plan document "infects the plan documents with uncertainty." (*Id.* at 17). Thus, defendant asserts that there is a substantial basis for difference of opinion whether the Court correctly invalidated the termination language in the 1983 SPD based on a violation of ERISA § 402(b)(3).

Defendant next asserts that appeal on these issues will materially advance termination of this litigation because if the Third Circuit disagrees with this Court on any of these ques-

tions, it will be unnecessary to continue with the discovery and trial of the damages issues in this case.

Plaintiffs do not oppose this motion, as indicated above, and request only that the damages portion of this case continue pending this motion and any appeal that might follow.

DISCUSSION

Certification

Defendant seeks a certification under 28 U.S.C. § 1292(b), which provides as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be *of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.* The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(First emphasis added; last emphasis in original). Title 28 U.S.C. § 1292(b) "is designed to allow for early appeal of a legal ruling when resolution of an issue may provide more efficient disposition of the litigation." *Ford Motor Credit Co. v. S.E. Barnhart & Sons*, 664 F.2d 377, 380 (3d Cir. 1981).

As indicated above, the parties agreed that the liability and damages portion of this case should be bifurcated. Accordingly, this Court has yet to determine the damages suffered by each of the several hundred plaintiffs. Defendant

contends that permitting an appeal of the liability issue therefore could avoid the "costly and time-consuming discovery and trial" necessary to determine those damages.

The Court believes that there is no substantial ground for difference of opinion on the grounds upon which the Court's decision is based.[1] Furthermore, quantification of the damages of the class members does not presently appear to be a particularly complex and lengthy matter. There should be no delays in proceeding to determine and pay the sums to which the plaintiffs, all of them senior citizens, are entitled. One must keep in mind that this action was filed in 1984. An interlocutory appeal would serve no practical, economic benefit to anyone if the damages phase of the case continued pending such an appeal. If all proceedings in the damages phase were stayed pending an interlocutory appeal, the conclusion of this litigation would not be "materially advance[d];" rather it would be unduly delayed, to the inevitable prejudice of the aging plaintiff class. Defendant's motion for certification of this Court's determination upon liability, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), is denied.

/s/ JOHN W. BISSELL
JOHN W. BISSELL
United States District Judge

DATED: December 17th, 1990

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[1] Rather, it finds the defendant's arguments hypertechnical and strained given the basic, straightforward grounds for the decision reflected in this Court's opinion.

Appendix E

Order of the District Court on Motion for §1292(b) Certification (December 17, 1993)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 84-4542

FRANK C. SCHOONEJONGEN, et. al., on behalf of themselves and all others similarly situated,

Plaintiffs,

—v.—

CURTISS-WRIGHT CORPORATION,

Defendant.

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 17th day of December, 1990,

ORDERED that defendant's motion for certification of this Court's determination upon liability, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), is denied.

/s/ JOHN W. BISSELL
JOHN W. BISSELL
United States District Judge

Appendix F

Decision of the District Court on Cross-Motions for Summary Judgment (April 11, 1986)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil 84-4542 (JWB)

FRANK C. SCHOONEJONGEN, et. al.,

Plaintiffs,

—v.—

CURTISS-WRIGHT CORPORATION,
a Delaware Corporation,

Defendant.

Before:

HON. JOHN W. BISSELL, U.S.D.J.

Appearances:

(DECISION OF THE COURT)

Pursuant to Section 753 Title 28 United States Code the following transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

/s/ LARRY HENNEFELD
Larry Hennefeld, C.S.R.,
Official Court Reporter

TRANSCRIPT OF PROCEEDINGS

This case arises out of a complaint filed on October 31, 1984, by a group of retired supervisors, administrators, and other non-union workers formerly employed by defendant Curtiss-Wright Corporation at its Wood-Ridge, New Jersey facility. On August 14, 1985, the named plaintiffs were certified as class representatives of the class composed of all non-bargaining unit employees who retired from employment at Curtiss-Wright's Wood-Ridge facility.

The two count complaint as amended alleges that the defendant's termination of the post-retirement health benefits provided to the retirees pursuant to an employee benefit plan was arbitrary and capricious and in violation of the provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Section 1001 *et. seq.* (Count I). The amended complaint further alleges that the defendant's actions and the plaintiffs' reasonable and detrimental reliance upon them create a federal common law contract right to the post-retirement benefits (Count II).

The matter is currently before the Court on the plaintiffs' motion for partial summary judgment on Counts I and II and the defendant's cross-motion for partial summary judgment on Counts I and II.

Most of the facts of this case are undisputed. In 1966 Curtiss-Wright established a post-retirement health benefits program for the employees of its Wood-Ridge facility. The health benefits program was an unfunded plan meaning that a trust fund was never established. Rather, the plan was paid for on an annual basis by Curtiss-Wright. From the institution of the plan in 1966 until January 1, 1971, the benefits were provided through Liberty Mutual Insurance Company. The scope of the plan was set forth in Certificates of Insurance issued by Liberty Mutual.

In 1971, the group policy with Liberty Mutual was terminated and a new policy with Prudential obtained. In 1973, the group policy with Prudential was terminated and new policies

with Blue Cross and Blue Shield obtained. In January 1975, the Blue Shield policy was terminated and a new group policy with Prudential was obtained for medical-surgical coverage. (The Blue Cross policy for hospitalization was continued.) In 1976, Curtiss-Wright became self-insured for medical-surgical benefits, terminated the Prudential policy, and entered into an administrative services contract with Prudential to administer its self-insured coverage. Finally, in February, 1983, Curtiss-Wright became self-insured for both medical-surgical and hospitalization, terminated its contracts and policies, and established a new plan with Blue Cross and Blue Shield as administrator.

With the exception of the last plan no plan expressly provided for the termination of the benefits upon the closing of the facility at which the retiree had been employed. Regarding termination, the plans between 1966 and 1983 generally provided that coverage under the Plan would terminate if the retiree died or became eligible for Medicare benefits, if the Group Policy terminated, or if the class of persons of which an individual was a member ceased to be covered by the Plan.

When the summary plan description of the last plan was issued it contained a new provision for the termination of health care benefits, that being that:

"Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired."

The insertion of that termination provision was the first time that the defendant had given notice that the continuation of health benefits was contingent upon the continued operation of the facility from which the employee retired. On November 4, 1983, the defendant notified the retirees that the Wood-Ridge facility would be closed at the end of the month and that their post-retirement health benefit coverage was being terminated. The plan itself, however, was not terminated.[1]

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[1] Post-retirement health benefits have been continued for those retirees whose last active employment for defendant was in other facil-

I. *The ERISA Claim*

"ERISA is a comprehensive statutory scheme designed to protect employees enrolled in pension and benefit plans . . . one very important policy underlying ERISA is that employees enrolled in a benefit plan should not be deprived of compensation that they reasonably anticipate under the plan's purported coverage." *Northeast Dept. ILGWU v. Teamsters Local Union No. 229*, 764 F.2d 147, 162-3 (3d Cir. 1985). 29 U.S.C. Section 1002 defines "employee *welfare* benefit plans" and expressly distinguishes them from "employee benefit plans". Both are "employee benefit plans" regulated by ERISA. However, 29 U.S.C. Section 1003 limits the scope of the restrictions imposed upon welfare benefit plans. Section 1003(a) states that ERISA governs employee welfare benefit plans except as otherwise provided in, *inter alia*, Sections 1051 and 1081, which, in turn, exempt employee welfare benefit plans from ERISA's stringent participation, vesting, and funding standards. See *In re White Farm Equipment Co.*, 42 B.R. 1005, 1012 (N.D. Ohio 1984), expedited appeal granted (April 15, 1985), suggestion of bankruptcy filed staying appeal (June 24, 1985).

Under ERISA's vesting rules, only accrued benefits must be nonforfeitable. 29 U.S.C. Section 1053(a).

"The term 'accrued benefit' refers to pension or retirement benefits *and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance*, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. *To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.* Also, where the employee moves from one employer to another, the ancillary benefits (which are usually on a contingency basis)

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ities and for those retirees who were considered "corporate" employees rather than employees at the Wood-Ridge facility at the time of their retirement.

would often be provided by the new employer, whereas the new employer normally would not provide pension benefits based on service with the old employer."

Conference Report, reprinted at 1974 U.S. Code Cong. & Admin. News at 4726. (emphasis added)

"An employee therefore can 'accrue' no 'vested' right to medical insurance benefits". *Musto v. American General Corp.*, 615 F. Supp. 1483, 1496 (M.D. Tenn. 1985); See also *Viggiano v. Shenango China Division of Anchor Hocking*, 750 F.2d 276, 279 (3d Cir. 1984) ("ERISA does not require an employer to establish a hospitalization plan *nor continue it indefinitely*", emphasis added). The Third Circuit in *Viggiano* cited with approval, *Sutton v. Weirton Steel Div. of National Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984), for the proposition that even though a company acts as an administrator of its own pension plan it "could terminate ancillary, nonvested benefits without violating ERISA". 750 F.2d at 279-80. Accordingly, it is clear that the defendant did not have an express duty under ERISA to maintain the health benefits in question.

While not alleged in the amended complaint, in their brief the plaintiffs also argue that Curtiss-Wright failed to comply with ERISA's reporting and disclosure requirements. 29 U.S.C. Sections 1021 and 1022 require that employee benefit plan administrators furnish every covered participant and every beneficiary with a summary plan description which shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. "[The] summary plan description must not mislead, misinform, or fail to inform participants and beneficiaries of the Plan" *Genter v. Acme Sales & Supply Co.*, 776 F.2d 1180, 1185 (3d Cir. 1985).

Plaintiffs argue that Curtiss-Wright failed to meet that aspect of its fiduciary duty since at no time prior to the 1983 plan summary being distributed did Curtiss-Wright inform the participants and beneficiaries of the Plan that their benefits would terminate upon the closing of the facility from which they retired.

In opposition, Curtiss-Wright argues that contrary to the plaintiff's characterization of the employee welfare benefit plan as comprising one unending plan which began in 1966 and continued into 1983, the health program actually consisted of a series of health insurance plans, with each plan providing advice of possible termination, and each terminating in accordance with that advice.[2] Curtiss-Wright contends that the implementation of each new plan either explicitly or implicitly informed the beneficiary of the predecessor plan's termination.

A determination of the issue of whether Curtiss-Wright breached its fiduciary duty of disclosure necessarily depends on whether the Plan was one unending Plan as plaintffs contend or whether it was a series of Plans instituted and then terminated. That determination would seem to be a mixed question of fact and law. Clearly, the factual issues are in dispute and, accordingly, the granting of summary judgment is not possible.

As to Count I of the amended complaint, therefore, the Court grants Curtiss-Wright's motion for summary judgment to the extend that that Count sought to impose an expressed statutory duty under ERISA to continue to maintain the employee welfare benefit plan involved herein. However, the Court does not grant summary judgment to either side regarding any other claims contained in Count I.

II. *The Federal Common Law Claim*

"[A]lthough welfare benefit plans are not subject to the vesting and participation provisions of ERISA, an employee nevertheless may acquire a contractual interest in such benefits, enforceable under federal common law". *Musto v. American General Corp.*, 615 F. Supp. 1483, 1497 (M.D. Tenn. 1985). That contractual interest arises from the presence of a unilateral offer given by the employer and the

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[2] As stated earlier the Plans stated that an individual's coverage would terminate if the Group Policy was terminated.

acceptance by way of continued employment and eventual retirement by the employee. Necessarily, however, the intent of the parties must be determined, often through an examination of the plan documents.

In this case analysis of the plan documents first require a determination of whether the Plan was in fact one uninterrupted plan as plaintiffs characterize it or whether it was a series of plans as characterized by the defendant. That factual determination, as stated earlier, cannot be made on this summary judgment motion.

Once that determination is made, the Court will then have to determine whether or not Curtiss-Wright had a contractual right to terminate the health benefits to some or all of the retirees. On the record as is presently stands, the Court cannot make that determination.

The cross-motions of the parties for summary judgment on Count II of the amended complaint are denied.

Appendix G

Opinion of the District Court on Cross-Motions for Summary Judgment (August 15, 1988)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 84-4542

FRANK C. SCHOONEJONGEN, et al.,

Plaintiffs,

—v.—

CURTISS-WRIGHT CORPORATION,

Defendant.

APPEARANCES:

LEWIS, GREENWALD, KENNEDY & LEWIS, P.C.
By: Nicholas F. Lewis, Esquire
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OPINION

BISSELL, *District Judge*

This case arises out of a complaint filed on October 31, 1984, by a group of retired supervisors, administrators, and other non-union workers formerly employed by defendant Curtiss-Wright Corporation at its Wood-Ridge, New Jersey facility. On August 14, 1985, the named plaintiffs were certified as class representatives of the class composed of all non-bargaining unit employees who retired from employment at Curtiss-Wright's Wood-Ridge facility.

The two-count complaint as amended alleges that the defendant's termination of post-retirement health benefits provided to the retirees pursuant to an employee benefit plan was arbitrary and capricious and in violation of the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* (Count I). The amended complaint further alleges that the defendant's actions and the plaintiffs' reasonable and detrimental reliance upon them create a federal common law contract right to the post-retirement benefits (Count II). Plaintiffs seek to compel defendant to immediately reinstate post-retirement health benefits to all members of the plaintiff class.

This case is currently before the Court on the plaintiffs' motion to divide the plaintiff class into two subclasses, one subclass consisting of all members of the plaintiff class who ceased active employment with defendant Curtiss-Wright on

or before April 1, 1983 and the other subclass consisting of all members of the plaintiff class who ceased active employment with Curtiss-Wright after April 1, 1983. In addition, the plaintiff subclass consisting of those members of the class who left active employment prior to April 1, 1983, move for summary judgment on Counts I and II. Defendant Curtiss-Wright has cross-moved for summary judgment on Counts I and II, as to all plaintiffs.

Identical cross-motions for summary judgment were before this Court in April 1986. At that time, this Court held that medical insurance benefits are not accrued benefits under ERISA but are considered ancillary, nonvested benefits which may be terminated without violating ERISA. *Schoonejongen v. Curtiss-Wright Corp.*, Civil No. 82-4542, slip op. at 6-7 (D.N.J. April 11, 1986) (citing *Viggiano v. Shenango China Division of Anchor Hocking*, 750 F.2d 276, 279-80 (3d Cir. 1984)). Accordingly, this Court found that "it is clear that the defendant did not have an express duty under ERISA to maintain the health benefits in question." *Id.* at 7.

Plaintiffs also presented an alternative argument for granting summary judgment on Count I, that defendant Curtiss-Wright failed to comply with ERISA's reporting and disclosure requirements. As to this alternative theory of recovery under ERISA, this Court concluded as follows:

> A determination of the issue of whether Curtiss-Wright breached its fiduciary duty of disclosure necessarily depends on whether the Plan was one unending Plan as plaintiffs contend or whether it was a series of Plans instituted and then terminated. That determination would seem to be a mixed question of fact and law. Clearly, the factual issues are in dispute and, accordingly, the granting of summary judgment is not possible.

Id. at 8. Thus, Curtiss-Wright's motion for summary judgment as to Count I was granted to the extent that the plaintiffs sought to impose an express statutory duty under ERISA to continue to maintain the Employee Welfare Benefit Plan

involved herein and the cross-motions for summary judgment regarding any other claims contained in Count I were denied.

The parties' cross-motions for summary judgment on Count II were similarly denied because a determination of whether Curtiss-Wright had a contractual right to terminate the retirees' health benefits hinges in part on whether the Plan was in fact one uninterrupted plan as plaintiffs characterize it or a series of plans as characterized by defendant. *Id.* at 9. After several months of additional discovery on this issue of fact, the parties now renew their summary judgment motions, which they contend are ripe for determination.

FACTUAL BACKGROUND

Most of the facts of this case are undisputed. In 1966 Curtiss-Wright established a post-retirement health benefits program for the employees of its Wood-Ridge facility.[1] It is undisputed that these benefits were provided through a non-contributory[2] employee health benefit plan that was designed to provide varying benefits to both active and retired employees. Curtiss-Wright was and is both the plan sponsor and administrator of the program. The benefits in question were not the subject of any collective bargaining agreement. Plaintiffs contend these health benefits were provided pursuant to a single ongoing benefit program which began in 1966 and continued into 1983. Defendant, however, knew these benefits to have been provided by a succession of health insurance plans terminated each time the insurer was changed, notice of which was provided to plaintiffs upon the implementation of each new successive plan, thereby either

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[1] Post-retirement health benefits are not provided to all Curtiss-Wright employees but only employees of certain Curtiss-Wright facilities, including the Wood-Ridge, Buffalo and Flight Systems divisions. Alito Aff. of 3/10/86, Exh. A (Ehinger Dep.) at 48.

[2] The term "noncontributory" describes a plan under which benefits are funded solely by the employer.

explicitly or implicitly informing the beneficiaries of the predecessor plan's termination.

The health insurance benefits made available by this employee benefits program were provided by a succession of insurance carriers. From the institution of the plan in 1966 until January 1, 1971, the actual health insurance benefits were provided through Liberty Mutual Insurance Company ("Liberty Mutual"). The scope of the plan was set forth in Certificates of Insurance issued by Liberty Mutual and distributed to all eligible active and retired Curtiss-Wright employees. *See* Pl. Statement of Uncontested Facts, Exh. A. In addition to the Certificates of Insurance, Curtiss-Wright issued two pamphlets during this coverage period describing its post-retirement health insurance program. Both of these booklets distributed by Curtiss-Wright contained provisions addressing termination of insurance. The first booklet, which had an effective date of July 1, 1966, contained the following statement under the heading "Termination of Insurance":

> Your insurance, or that of a dependent, will terminate if you, or such dependent, becomes eligible for Medicare benefits under the Federal Social Security Act, in the event of your death, or if the Group Policy terminates.[3]

Id., Exh. B at 4. The second pamphlet, which appears to have been prepared in 1970, similarly stated:

> Your insurance, or that of a dependent, will terminate in the event of your death, or if the Group Policy terminates.

Id., Exh. C at 8. These provisions in the booklets prepared and distributed by Curtiss-Wright were not contradicted by the underlying Certificates of Insurance issued by Liberty

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[3] While this booklet contained no specific reference to the duration or continuation of coverage other than this termination clause, there is a broad statement under the heading "covered expenses," which provides:

> Benefits under this insurance coverage will be payable for expenses covered which are incurred by an insured retired employee or his eligible dependents on and after July 1, 1966.

Pl. Statement of Uncontested Facts, Exh. B at 1.

Mutual. Those certificates specifically stated that the benefits provided thereunder would be reduced by the value of Medicare benefits given covered individuals and addressed termination of insurance with respect to covered dependents only. *Id.*, Exh. A. Only one of the three Certificates of Insurance provided the Court contains a provision on termination of insurance of the covered retiree. *See id.*, Exh. A-3. That Certificate states that the insurance of a protected person ceases upon eligibility for medicare or "upon his death prior thereto." *Id.* at 3.

In 1971, Liberty Mutual was terminated as Curtiss-Wright's insurance provider and a new contract with Prudential Insurance Company of America ("Prudential") was obtained. This relationship remained in effect until 1973. Neither the policy pursuant to which post-retirement health benefits were provided through Prudential nor any booklet prepared by Curtiss-Wright describing the coverage provided through Prudential during this period have been made a part of the record. With respect to this coverage period, the only documents before the Court are Coverage Riders to the Group Policy, which contained no statements as to the duration or termination of coverage. *See id.*, Exh. D.

After termination of the Group Policy with Prudential in 1973, Curtiss-Wright entered into agreements with Blue Cross and Blue Shield of New Jersey to provide active and retired employee health insurance benefits. Curtiss-Wright's contract with Blue Cross provided for termination of an employee's coverage upon notification by the employer that coverage of an employee is to be terminated, with no specific grounds for such termination specified except leaving the employ of the employer. *Id.*, Exh. F at 16. A similar provision is contained in the Group Contract between Curtiss-Wright and New Jersey Blue Shield. *Id.*, Exh. G at 16-17. These contracts also contained a provision specifying that they would be automatically renewed from year to year unless terminated by either party in writing with 60 days notice. *See Id.*

Coinciding with this changing of insurers to Blue Cross and Blue Shield, a new booklet outlining Curtiss-Wright's Group

Health Benefits was prepared. In this pamphlet, Curtiss-Wright addressed the issue of termination of these group health benefits:

> **Termination of Benefits** . . . Your benefits will continue throughout your retirement or until the date the class of persons of which you are a member ceases to be covered by the Program. A dependent's coverage terminates when your coverage terminates or on the last day of the month in which he or she ceases to meet the qualifications of an eligible dependent. In the event of your death, your dependents will continue to be covered until the end of the calendar month following the month of your death. However, should you or any of your dependents be receiving covered inpatient care at the time your coverage terminates, benefits will continue to be provided to the extent available for that confinement.

Id., Exh. E at 4. Nowhere in this booklet does Curtiss-Wright define the term "class of persons of which you are a member." However, both contracts between Curtiss-Wright and Blue Cross and Blue Shield, under which the benefits outlined in this booklet were provided, contain an identical "Schedule A" outlining the classification of employees eligible for coverage under the agreement. Included in the classification of employees eligible for benefits are:

> All full-time salaried non-bargaining exempt and non-exempt Employees retired prior to January 1, 1973.
>
> All full-time salaried, non-bargaining exempt Employees retired on or after January 1, 1973.

Id., Exh. F at 2 and Exh. G at 3.

In January 1975, the insurance carrier for the medical-surgical portion of the post-retirement health benefit program was changed from Blue Shield back to Prudential. The Group Policy with New Jersey Blue Cross for hospitalization was continued. This arrangement with Prudential remained in place for one year. The only documents produced with respect to this Group Policy are Coverage Riders which do not

address the issue of continuation or termination of an employee's coverage. *See id.*, Exh. H.

Curtiss-Wright continued to obtain its employee hospitalization insurance through New Jersey Blue Cross until 1983. However, in September 1976, defendant terminated its Group Policy with Prudential for medical-surgical benefits, became self-insured for these benefits, and entered into an Administrative Services Contract with Prudential to administer its self-insured coverage program. Correspondingly, Curtiss-Wright established and funded the Curtiss-Wright Employee Benefit Plan for the purpose of providing for the payment of life, health and other benefits to employees, their dependents and/or beneficiaries. Under the constitution of the Curtiss-Wright Employee Benefit Plan, effective September 1, 1976, the company specifically reserved the right to amend or modify the Plan:

> 1. *General.* The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan. No such modification or amendment shall make it possible for any of the funds of the Trust established under the Plan adopted by the Company to be used for or diverted to purposes other than for the exclusive benefit of employees, their dependents, or their allowed beneficiaries and expenses, prior to satisfaction of all liabilities with respect to them.

England Aff., Exh. H at 5-6. The constitution also provided for termination of the Plan:

> 1. *Termination by Company.* The Company reserves the right to terminate the Plan established hereby for any reason at any time. In case of termination, the Fund under the Plan shall be used for the exclusive benefit of employees, their dependents, and their allowed beneficiaries as of the time of such termination, except that funds in a Trust not required to satisfy all liabilities of the Fund for benefits and expenses because of an erroneous computation shall be returned to the Company and

Participants in proportion to the amounts each such contributor shall have contributed with respect to such Trust.

2. *Termination for Other Reasons.* The Constitution and the Company's liabilities under the Plan shall terminate upon the Company's legal dissolution, adjudication as a bankrupt, making of a general assignment to and for the benefit of creditors.

Id. at 6-7. Simultaneously with the establishment of this Employee Benefit Plan, Curtiss-Wright also entered into a Trust Agreement with New Jersey Bank, as trustee of the fund provided thereunder. *See id.*, Exh. G.

Pursuant to the Administrative Services Agreement between Curtiss-Wright and Prudential, the persons to whom the plan of benefits applied were divided into sixteen classes, and different summary plan description booklets were provided to each group of employees. Retirees were divided into three classifications under this agreement:

14. All full-time Exempt Retired Salaried Employees located in the United States.

15. All full-time Retired Employees (other than Employees of Target Rock Corporation and Marquette Metal Products Company, subsidiaries of Curtiss-Wright Corporation), who (i) are in bargaining units represented by unions with whom the Employer has entered into collective bargaining agreements or (ii) are classified as full-time non-bargaining non-exempt Employees.

16. All full-time Retired Employees of Marquette Metal Products Company, a subsidiary of Curtiss-Wright Corporation, who (i) are covered by a collective bargaining agreement existing between the Employer and UAW Local 527, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America or (ii) are classified as full-time non-bargaining non-exempt Employees.

Pl. Statement of Uncontested Facts, Exh. I at Exh. A.

The members of the plaintiff class herein clearly fall within the retiree classifications set forth in ¶¶ 14 and 15(ii), depending on their exempt or non-exempt status. Neither party has produced the summary plan description booklets containing the applicable benefits for either of these classifications. Rather, the booklet submitted provides the employee benefit plan applicable to all active employees of Curtiss-Wright's Wood-Ridge plant who were full-time non-bargaining, non-exempt employees.[4] *See id.*, Exh. J. Evidential for present purposes are the termination of coverage provisions of the booklet applicable to active employees, which provided that termination of coverage can occur for the following reasons: "when your employment terminates," when "you cease to be a member of a class eligible for coverage under this plan," and upon "discontinuance of the plan." *Id.*, Exh. J at 63. The July 1, 1978 amendment to the Administrative Services Agreement between Prudential and Curtiss-Wright makes clear that this booklet, applicable to active full-time non-bargaining non-exempt employees of the Wood-Ridge facility, was replaced by a new plan of benefits, which also has not been provided to the Court.

After 1973, Curtiss-Wright provided summary descriptions of benefits in response to employee and retiree requests for information on the plan. Defendant admits that "[a]t first, these typewritten explanations contained neither a promise nor a warning about the duration of benefits." Def. Brief at 15. Instead, this synopsis described the exact medical benefits available to eligible retirees, while providing no notice or even any mention of what circumstances, if any, could result in a termination of benefits. *See* Pl. Statement of Uncontested Facts, Exh. K. A similar document, dated 1978, also contains no statement as to the possibility of termination of these benefits. *See id.*, Exh. L.

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[4] It is clear this booklet applies to active employees and not retirees because the general information on coverage explicitly states that coverage ends when employment terminates and ceasing active work is considered to be immediate termination of employment. Pl. Statement of Uncontested Facts, Exh. J at 63.

Curtiss-Wright, however, contends that beginning in 1975, the effective date of ERISA, the program description given to employees and retirees outlining the post-retirement health benefits contained clear reservations of rights to terminate, amend or modify the benefits program. *See id.*, Exh. M (undated document). In making this statement, defendant relies on a document entitled, "The Curtiss-Wright *Executive* Post-Retirement Health Benefits Program" (emphasis added). As to that portion of the plaintiff class who fall into the category of an "executive," if any do, defendants contend that after 1975 they were informed of the following possibilities of termination of coverage:

> A retiree's coverage will terminate on the date of his or her death or on the date the class of persons of which the retiree is a member ceases to be covered by the Program.
>
> * * *
>
> CURTISS-WRIGHT CORPORATION RESERVES THE RIGHT TO MODIFY, REVOKE, SUSPEND, CHANGE, OR TERMINATE THE PROGRAM IN WHOLE OR IN PART, AT ANY TIME.

Id.

Of the documents required to be provided employees and retirees in accordance with the disclosure and notice provisions of ERISA, the parties have provided to the Court the summary annual report for the years 1979 to 1983 on the Curtiss-Wright Employee Welfare Benefit Plan. *See* England Aff., Exhs. B, C, D, E and F. While these summaries do not address termination of individual plan members' coverage, they contain a general statement that:

> The company expects and intends to continue this plan indefinitely, but reserves the right to discontinue or amend it.

Id.

Beginning in 1982, Curtiss-Wright management implemented a new policy under which the company was to include the following clause at the end of every hand-out of any type which describes the post-retirement health care coverage offered by the company:

> Although the Company fully expects to continue this benefit, you should be aware that unlike your retirement benefit which is a vested benefit, the retirement health care coverage is not a guaranteed benefit and therefore is subject to change or termination.

Pl. Statement of Uncontested Facts, Exh. P. However, this new addition to program summaries did not specify what event could cause such a change or termination of benefits. Although this policy was adopted in 1982, no plan document has been presented to the Court which contained this disclaimer before April 1983.

In February 1983, defendant Curtiss-Wright became self-insured for both medical-surgical and hospitalization health insurance benefits. It accordingly terminated its hospitalization group policy with Blue Cross and its Administrative Services Contract for medical-surgical coverage with Prudential and established a new self-insured program with Blue Cross and Blue Shield as administrator. Following this change, a new summary plan description booklet was issued which contained the following provision on termination of health care benefits:

> Coverage for you and your dependents terminates on the last day of the month in which you cease to be an eligible employee of Curtiss-Wright or any of its named subsidiaries which are covered under this Plan.
>
> Coverage for dependents will cease when he or she no longer meets the definition of an "Eligible Dependent" as described on page 3 of this booklet.
>
> All coverage under this Plan will cease upon discontinuance of the Plan for any reason.

> *Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired.*

Pl. Statement of Uncontested Facts, Exh. V at 32 (emphasis added). The insertion of this termination provision expressly providing for the discontinuance of the benefits upon the closing of the facility at which the retiree had been employed was the first time the defendant had explicitly stated that the continuation of post-retirement health benefits was contingent upon the continued operation of the facility from which the employee retired. In addition, at the very end of this booklet, the issue of plan continuation is addressed:

> **Plan Continuation**—The Company expects and intends to continue this Plan indefinitely but reserves the right to end or amend it.
>
> . . .
>
> Although the Company expects this Plan to continue in its present form for an indeterminable period, this Plan is not a vested Plan and as such is subject to modification or termination by the Company at any time.

Id. at 36.

On November 4, 1983, defendant notified the plaintiff retirees that its Wood-Ridge, New Jersey facility would be closed at the end of the month and that their post-retirement health benefit coverage was being terminated. The Curtiss-Wright Employee Benefit Plan itself, however, was not terminated.[5]

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[5] Post-retirement health benefits have continued for those retirees whose last active employment for defendant was in other facilities covered by the Curtiss-Wright Employee Benefit Plan and for those retirees covered by the Plan who were considered "corporate" employees rather than employees at the Wood-Ridge facility at the time of their retirement.

ARGUMENT

I. Plaintiffs' Motion to Subdivide the Plaintiff Class

In their motion to divide the plaintiff class pursuant to Federal Rule of Civil Procedure 23(c)(4), plaintiffs seek to have the Court establish two subclasses of plaintiffs, one containing all class members who left active employment prior to April 1, 1983, and the other containing all class members who remained in active employment after April 1, 1983. The date of April 1, 1983 has been selected by plaintiffs as the crucial date for these purposes, because that is when Curtiss-Wright for the first time expressly stated, as pertains to its post-retirement health insurance benefits, that it reserved the right to terminate these benefits in the event of a plant shutdown. In addition, the terminology "left active employment" is being used because the booklet containing this reservation was distributed to active employees only, and there are employees who left active employment prior to the distribution of the booklet who did not officially retire until sometime later, after exhaustion of severance benefits.

Initially, defendant Curtiss-Wright contends that the 1983 Blue Cross/Blue Shield booklet governs the claims of all plaintiffs, making subclasses unnecessary, and that the present action is not appropriate for resolution as a class action due to the vast differences with respect to each plaintiff. Nonetheless, Curtiss-Wright goes on to state that it "does not oppose the creation of subclasses as to the claims which retain class action status, but submits that plaintiffs' proposal does not go far enough." Def. Brief at 60. Defendants propose the plaintiff class be subdivided according to which booklet or program of benefits was in effect at the time of their retirement, thereby resulting in seven subclasses. *See id.* at 61.

At oral argument on this motion, the Court resolved plaintiff's motion, in part, stating:

> The plaintiffs' motion to designate two subclasses along the lines reflected by Mr. Lewis [plaintiffs' counsel] is granted. The Court can see a significant, although perhaps not ultimately determinative, distinction between

> those two groups based upon the terminology in the 1983 booklet which appeared for the first time, including that which is particularly at issue here, which says, "Coverage under this plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired."
>
> I would add that this determination by the Court at this point is without prejudice to further potential subclassification, should the arguments advanced by the defendant prevail regarding those who retired prior to the 1983 booklet. Whether that relief will be granted ultimately as a result of the motions presently before me or otherwise is yet to be determined by the Court.

Transcript of Proceedings of 6/24/87 at 11-12. The Court reserved decision on the additional subclassifications proffered by defendants.

As is developed more fully below, the Court determines upon consideration of the rest of the parties' cross-motions, that further subclassification of the plaintiff class is warranted. For purposes of plaintiffs' Count 1 claim only, alleging a violation of the reporting and disclosure requirements in § 1022 of ERISA, the plaintiff subclass of employees who retired before April 1983 is further subdivided into those employees who retired prior to 1975 and those who retired between 1975 and April 1983. The year 1975 is a crucial date for plaintiffs' ERISA claim, because that is the year ERISA became law and its disclosure requirements became applicable to defendant's summary plan descriptions. As with this Court's prior decision, this determination is without prejudice to further subclassification.

II. CROSS-MOTIONS FOR SUMMARY JUDGMENT

On a motion for summary judgment, the Court must determine whether "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law." Fed. R. Civ. P. 56(c). An issue of fact is "material" only when the dispute is over facts that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The substantive law identifies which facts are material. *Id.* The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Id.* at 247-48. The Court must also consider the record in the light most favorable to the party opposing the motion. *Betz Laboratories, Inc. v. Hines*, 647 F.2d 402, 404 (3d Cir. 1981). Keeping this standard in mind, the Court will proceed to address each count of the complaint in turn.

A. Count I—ERISA Claim

The parties agree that Curtiss-Wright's post-retirement health benefit plan is an "employee welfare benefit plan" governed by the provisions of ERISA, 29 U.S.C. § 1002(1). ERISA was enacted to protect the interests of employees covered under employee benefit plans. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). One way in which this was done was by providing a private right of action to any beneficiary to enforce the terms of a welfare benefit plan. *See* 29 U.S.C. § 1132(a)(3)(B)(ii).

ERISA sets various uniform standards for employee welfare benefit plans. To fulfill its curative aim ERISA and its standards are to be given a liberal interpretation to safeguard the interests of fund participants and beneficiaries and to preserve the integrity of fund assets. *Gilliam v. Edwards*, 492 F. Supp. 1255, 1261 (D.N.J. 1980). Welfare benefit plans are expressly excluded from ERISA's vesting and participation requirements and its funding requirements. *See* 29 U.S.C. § 1051(1), 1081(a)(1). Nor is any other provision of ERISA which restricts cancellation or change applicable to such plans. Accordingly, ERISA does not prevent elimination of previously offered benefits so long as they are not vested or

accrued. *Viggiano*, 750 F.2d at 279-80. *See also Henne v. Allis-Chalmers Corp.*, 660 F. Supp. 1464, 1471 (E.D. Wisc. 1987). Welfare plans, however, are subject to the statute's reporting and disclosure requirements, 29 U.S.C. §§ 1021-1031, and its standards of fiduciary conduct governing an employer's administration of the plan. 29 U.S.C. §§ 1101-1114. The parties agree that defendant Curtiss-Wright is the plan administrator of the employee welfare benefit plan at issue here and, thus, is a fiduciary to the plan. 29 U.S.C. § 1002(14), (16), (21).

The plaintiff subclass which left active employment prior to April 1, 1983 offers several arguments in support of their motion for partial summary judgment on their ERISA claim in Count I. First, they contend that defendant, as a fiduciary under ERISA, breached its duty to comply with the Act's reporting and disclosure requirements, specifically the requirement to disclose in the summary plan description the circumstances which may result in ineligibility or loss of benefits. *See* 29 U.S.C. § 1022(b). Secondly, plaintiffs assert that the great weight of authority holds that unless there is an express and unambiguous provision in a plan document made contingent upon specific events, *e.g.*, cessation of contributions, courts will not uphold the termination of post-retirement health insurance benefits, citing *In re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986). Pl. Memo. at 33. Accordingly, plaintiffs urge this Court to find that Curtiss-Wright failed to reserve its right to terminate the post-retirement health insurance benefits of its non-union Wood-Ridge employees prior to 1983 and thus, subsequently, termination of these benefits violated the express terms of the plan documents and was arbitrary and capricious.[6] Finally, plaintiffs claim defendant breached its fiduciary duty under ERISA by terminating their post-retirement health benefits.

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[6] This second claim asserted under Count I is in essence identical to Count II, which asserts a cause of action for federal common law breach of contract under ERISA. Accordingly, this argument is incorporated in and will be addressed under Count II.

Defendant Curtiss-Wright opposes plaintiffs' motion and cross-moves for summary judgment as to all plaintiffs on the same three legal points raised in plaintiffs' motion.

2. Breach of Disclosure Obligation under ERISA

In Count I, plaintiffs allege that defendant's actions in terminating their post-retirement health benefits violated ERISA. In their instant motions, plaintiffs specifically claim that the defendant violated ERISA when it breached the fiduciary duties imposed by § 1104 by failing to comply with the Act requirement that a summary plan description disclose the circumstances which may result in a termination of benefits.

Under ERISA, "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument . . ." 29 U.S.C. § 1102(a)(1). This writing, or plan description, "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1). The reporting and disclosure requirements of ERISA specifically provide that the employee benefit plan description and summary plan description shall contain the following information:

> The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, title, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; *circumstances which may result in disqualification, ineligibility, or denial or loss of benefits*; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and

> whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title)

29 U.S.C. § 1022(b) (emphasis added).

The reporting and disclosure requirements are further detailed in the regulations promulgated by the United States Department of Labor pursuant to this provision of ERISA. Under these regulations, the summary plan description "must not have the effect [of] misleading, misinforming or failing to inform participants and beneficiaries" with respect to pertinent provisions of the plan. 29 C.F.R. § 2520.102-2(b) (1987). Furthermore, the summary must contain

> (1) For both pension and welfare benefit plans, *a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide* on the basis of the description of benefits required by paragraphs (j) and (k) of this section.

29 C.F.R. § 2520.102-3(1) (emphasis added). Accordingly, the summary plan description must be written in a manner reasonably calculated to apprise the average participant of any rules that would occasion a loss or reduction of benefits and "must not mislead, misinform, or fail to inform participants and beneficiaries of the Plan." *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1185 (3d Cir. 1985). Representations made in a fiduciary capacity cannot have the effect of misleading or misinforming plan participants, nor can necessary information be withheld. *Id.*; *Morse v. Stanley*, 732 F.2d 1139, 1147 (2d Cir. 1984).

These reporting and disclosure requirements were enacted because Congress felt that "[i]t is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these con-

ditions were stated in a misleading or incomprehensible manner in plan booklets." H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4646. *See also* S. Rep. No. 127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4847. The disclosure standards of ERISA represented a major departure from earlier reporting and disclosure requirements applicable to employee pension benefit plans. ERISA was designed to disclose more significant information about plans and to provide participants and beneficiaries with specific data as to their rights and benefits under the plan and the circumstances which may result in loss of entitlement to these benefits. *Id.* at 4649-49. This intent is clearly stated in the report of the House Education and Labor Committee:

> [E]xperience has shown that the limited data available under the present Act is insufficient. Changes are therefore required to increase the information and data required in the reports both in scope and detail. Experience has also demonstrated a need for a more particularized form of reporting so that the individual participant knows exactly where he stands with respect to the plan—what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom the management and investment of his plan have been entrusted.

Id. at 4649.

In the present action, plaintiffs contend that while the defendant did furnish summary plan descriptions to participants and beneficiaries, these descriptions did not fully comply with the disclosure requirements set forth in § 1022 of ERISA and the Department of Labor regulations promulgated pursuant thereto. These summaries allegedly failed to "clearly identify the circumstances under which the plaintiff retirees' post-retirement health benefits could terminate" as required under ERISA.

Plaintiffs rely on the testimony of Richard A. DuBois, Director of Employee Benefits for Curtiss-Wright from 1979 to 1984, to support its argument. According to DuBois, when defendant closed its Marquette facility in Ohio in 1980 and terminated health insurance coverage for retirees who retired from that location, the retirees sued over the termination of benefits. It was at this time, DuBois states, that he realized that Curtiss-Wright's plan documents may not have complied with the spirit of ERISA by clearly setting forth circumstances under which the Wood-Ridge retirees' health benefits could be terminated:

> Q: Why was this new language added to the new booklet; if you recall?
>
> A: Well, the intent in producing a summary plan description is to make the rights and entitlements of the recipients of the coverage entirely clear to them and in the spirit of the ERISA law we try to do just that. Obviously, you cannot cover each and every eventuality. We made a very earnest attempt to do just that. Here what we mean by this language, the fact that I, as a benefits professional, might be able to take a predecessor booklet and interpret it in very much the same way. Okay. You can't rely on every employee having my depth of expertise in benefits. I know what it means. I knew the interpretation. I know what the intent was. The employee may feel otherwise, but in the spirit of the ERISA law, we said we're going to make this thing as crystal clear as we can.
>
> Q: Are you aware that ERISA requires that the book be capable of being understood by the average plan participant?
>
> A: Yes, I am very much.
>
> Q: You were concerned that the prior book might not be understood by the average plan participant?
>
> A: Yes. I had concerns along those lines.

Q: Did that concern stem from the dispute which arose at the closing of the Marguette facility?

A: It certainly did.

Q: In that case, did the plan participants believe that their benefits were not terminable?

A: Yes, they believed it was not.

Q: In fact, they sued the Curtiss-Wright Corporation?

A: In fact, they did.

* * *

Q: As a result of your concern, did you ever ask anyone at Curtiss-Wright to review the termination language contained in the booklet that was issued prior to [the booklet containing language that benefits would terminate if the plant from which you retired closed]?

A: Not as a specific review of that, and I will tell you why that is. We had some changes in our insurance program. We switched from Prudential to Blue Shield. The time was right to put out a new booklet anyway. In so doing, let's make it better than the old booklet. (pp. 20-22, *See* Exhibit T).

Memo. of Law at 27-28.

Plaintiffs also rely on the testimony of Aaron Carr, Esquire, Labor Counsel for defendant Curtiss-Wright since 1978, in which he stated that he became similarly concerned that the termination language in the defendants' benefit plan booklets was not sufficiently clear after he learned of the district court decision in *International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). In *Yard-Man*, the Sixth Circuit held that Yard-Man's termination of life and health insurance benefits of its retired employees at the expiration of the collective bargaining agreement was improper. *Id.* at 1478. The Court concluded that the retirees were entitled to continued insurance benefits because from the language of the collective bargaining agree-

ment it was possible to discern that the parties intended to create non-terminating life-long insurance benefits. *Id.* at 1480. It was Mr. Carr who drafted the termination language that ultimately appeared in the summary plan description distributed after February 1, 1983, which for the first time addressed the issue of termination of benefits if the plant from which the retiree retired closes.

Curtiss-Wright opposes this motion on the grounds that "[t]hrough its 1976 benefit book published by Prudential and its 1983 benefit book published by Blue Cross/Blue Shield," it complied with the disclosure requirements of ERISA. Def. Brief at 19. Specifically, defendants contend that:

> The booklets were clearly and simply written; they were accurate and comprehensive, and they contained all of the information designated by the statute and regulations, including the information directly at issue herein: "circumstances that may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b).

Id. Accordingly, defendant argues that plaintiffs were clearly advised their health benefits were terminable upon termination of the plan or termination of coverage for the class of employees of which they were a member. Defendants assert that either of these provisions could be found to have "simply and clearly advised participants of the contingency that in fact caused them to lose coverage under that plan in February 1983 and additionally advised them of the contingency that caused them to lose coverage later that year under the Blue Cross/Blue Shield Plan." *Id.* at 21. No statement is made by Curtiss-Wright in its brief as to its pre-ERISA (pre-1975) plan documents, nor have plaintiffs alleged a violation of pre-ERISA reporting and disclosure requirements as set forth in the Welfare and Pension Plans Disclosure Act.

The dispute between the parties centers on whether the summary plan descriptions issued by Curtiss-Wright satisfies the requirements of § 1022, instituted in 1975, and on whether a violation of that provision entitles the plaintiffs to retroactive restoration of their benefits. The Court agrees with the defendant that its decision in this case must be based on

the principles enunciated by the Third Circuit in *Genter v. Acme Sales & Supply Co.* The Third Circuit in *Genter* stated that under ERISA the eligibility requirements for participation and benefits *shall* be in the plan description and that the summary plan description *must* not mislead, misinform or fail to inform participants and beneficiaries of the plan. 776 F.2d at 1185 (emphasis added). There, the surviving spouse of a deceased employee of Acme Sales brought suit for life insurance benefits due her as the beneficiary of her husband's employer-sponsored contributory life insurance plan. The life insurance plan provided that upon reaching a designated salary plateau, an employee could receive the prescribed increase in life insurance by returning a notification card to the employer within 60 days of the anniversary date of the policy. The midstream method, a second method not described in the plan documents but utilized by the employer on selective occasions, allowed increases at times other than the anniversary date of the plan. Plaintiff's deceased husband received a salary increase to put him over the $20,000 plateau on January 11, 1982, thereby allowing for increased life insurance coverage to $20,000. Unfortunately, the decedent died a year after he received his salary increase and two months before an increase in insurance based on that raise could go into effect pursuant to the anniversary method.

In *Genter*, the plaintiff contended that the plan documents did not advise employees of their right to apply immediately at the time of a salary increase for increased life insurance coverage under the midstream method. Had this information been properly provided, the plaintiff argued that her husband could have applied for and been provided with life insurance coverage of $20,000 at the time of his death rather than the $10,000 that was in force at that time. The Third Circuit concluded that the district court erred in granting summary judgment on behalf of the defendant, denying the plaintiff's motion for summary judgment. In reaching this conclusion, the court found that

> the plan documents only advise an employee, in clear and plain terms, of his right to an anniversary date

> increase in his insurance level. There was never any information provided as to a midstream increase, even though the employer and the insurance company do not dispute the fact that such midstream privileges were permitted under the Plan in respect to certain employees. The failure to provide a clear and plain statement of the Plan description is a violation of ERISA, 29 U.S.C. § 1022(a)(1), for which, had the decedent known, he could have considered the midstream increase option that other employees exercised.

776 F.2d at 1185-86.

The Third Circuit in *Genter* seems to imply that deficiencies in the summary plan description are sufficient in themselves to permit the plaintiff to recover the higher amount of life insurance. *Id.* This is evident from the quotation above wherein the court found an ERISA violation in the absence of any evidence of reliance, but based on the court's assessment that had the decedent known of the second option for increasing insurance, he *could* have exercised that option. *Id.* at 1156. While it is clear the *Genter* court did not require the plaintiff to establish reliance as a prerequisite to recovery under § 1022, an implicit finding of prejudice may be gleaned from the court's analysis:

> Where we believe the court below erred in finding for the defendants was in limiting the decedent's rights under the life insurance policy solely to the anniversary date method insurance increase which the decedent had not requested prior to his death. If the decedent had known for the full year before he died that he had the right to increase his insurance midstream by a clear and plain explanation of that right in the insurance documents, he would have had the right any time during that year, but not the obligation, to request and receive the increased coverage. By reason of his death no one will know what his true preference would have been had he known of the midstream options. *It is the employee's right to be informed of his rights however, rather than*

> *the wisdom of the employee's decision concerning these rights that the Act is intended to protect. Whether he would have opted for more coverage is not necessary for us to consider. What is necessary to consider is the circumstance that his beneficiary has been denied the additional $10,000.00 of coverage that the decedent could have provided for her had he been properly informed.*

Id. (emphasis added). The *Genter* court reversed the district court's grant of summary judgment for the defendant's employer and employer administrator and directed the district court to enter judgment in favor of the plaintiff.

Where a plaintiff is seeking to invalidate a plan or to be awarded money damages or retroactive benefits based on a violation of ERISA's disclosure provision, 29 U.S.C. § 1022, most decisional law requires a showing of active concealment or of some significant reliance upon or possible prejudice flowing from a faulty summary plan description. *See, e.g., Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985) (active concealment); *Govoni v. Bricklayers, Masons & Plasterers International Union, Local No. 5 Pension Fund*, 732 F.2d 250, 252-53 (1st Cir. 1984) (reliance or prejudice); *Lee v. Union Electric Co.*, 789 F.2d 1303, 1308 (8th Cir.), *cert. denied*, 107 S. Ct. 460 (1986) (reliance or prejudice); *Hillis v. Waukesha Title Co.*, 576 F. Supp. 1103, 1109-10 (E.D. Wis. 1983) (reliance or prejudice); *Freund v. Gerson*, 610 F. Supp. 69, 71 (S.D. Fl. 1985) (reliance or prejudice); *Kochendorfer v. Rockdale Sash & Trim Co. Profit Sharing Plan*, 653 F. Supp. 612, 616 (N.D. Ill. 1987) (reliance or prejudice); *Henne*, 660 F. Supp. at 1474 (reliance or prejudice); *Ruotolo v. Sherwin-Williams Co.*, 622 F. Supp. 546, 550 (D. Conn. 1985) (reliance or prejudice). *See also* S. Bruce, *Pension Claims: Rights and Obligations* at 394 (1988) (reliance on, or injury from, the summary plan description statement or omission must be shown). In essence, these courts have found that an action for damages cannot lie for merely a "technical" breach of § 1022 or a procedural violation of ERISA. While the Third Circuit has not yet expressly addressed the question of whether reliance or prej-

udice is a prerequisite to recovery under § 1022, the Third Circuit panels in *Genter* and in *Baker v. Lukens Steel Co.*, 793 F.2d 509 (3d Cir. 1986), seem to have implicitly adopted a similar prerequisite. In *Baker*, the court of appeals accepted the district court's statement of the law that failure to comply with ERISA's notice requirements alone is not sufficient for recovery, but that the employees must show they suffered injury which is remedial under ERISA. 793 F.2d at 512. The court in *Baker* reversed the grant of summary judgment by the district court finding a material issue of fact as to whether plaintiffs' misinformed motive or reliance for continuing in their employment constituted an injury remedial under ERISA. Similarly, the *Genter* court seems to imply that the element of prejudice was present there. Thus, this Court is not persuaded that the finding of a deficiency in summary plan descriptions are sufficient in themselves to permit the plaintiffs to recover their lost health benefits. Instead, plaintiffs are entitled to recover only if they can establish that their loss of health benefits was a result of reliance on or prejudice resulting from deficiencies in the summary plan descriptions.

In this Court's earlier decision denying summary judgment on plaintiffs' § 1022 claim, the Court found that the sufficiency of the summary plan descriptions for § 1022 purposes and correspondingly whether the defendant breached its fiduciary duty of disclosure would seem a mixed question of law and fact, depending on whether the Plan was one unending plan or a series of plans instituted then terminated. Plaintiffs assert that additional discovery has resolved this question. First, they present a January 23, 1983 letter from Curtiss-Wright to all retired employees announcing a "Notice of Change in Health Care Coverage from Prudential to Blue Shield." Lewis Aff., Exh. D. This letter stated that "Curtiss-Wright is shifting coverage . . . from Prudential to Blue Shield of New Jersey." *Id.* This change in insurers was not addressed as a plan termination. Moreover, Richard DuBois, defendant's Director of Corporate Benefits and Compensation testified at his deposition that the change in health care insurance carriers did not result in termination of the post-retirement insurance program. *Id.*, Exh. E at 32. Aaron Carr,

labor counsel for Curtiss-Wright, stated at his deposition that a change in insurance carriers caused one program to discontinue and another to begin, but he did not and would not say this change in carriers caused the plan to terminate. *Id.*, Exh. F at 22-23. And finally, plaintiffs proffer the 1983 and 1984 annual tax return of Curtiss-Wright's employee health benefit plan, in which questions as to whether the plan was terminated during these years or prior years was marked "no." *Id.*, Exh. B.

The nature and means by which defendant supplied post-retirement health benefits changed dramatically over time. The first issue is whether the summary plan descriptions issued by defendant met the standards established by § 1022 and the regulations promulgated thereunder.[7] It is clear that the 1983 booklets expressly reserving the right to terminate benefits if the plant from which an employee retired closed, were in compliance with the disclosure requirements of § 1022.

In 1975, ERISA and its disclosure requirement in § 1022 became applicable to retirement plans. The summary plan booklet in existence at that time at Curtiss-Wright, which was issued in 1973, informed employees that "[y]our benefits will continue throughout your retirement or until the date the class of persons of which you are a member ceases to be covered by the program." Pl. Statement of Uncontested Facts, Exh. E at 4. This ambiguous on its face, is even more confusing when you consider that nowhere in the summary plan booklet is there any explanation as to what "class[es] of persons" covered employees are divided into.[8] This booklet remained in effect until 1975.[9]

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[7] For purposes of plaintiffs' claim in Count I, that defendant breached ERISA's reporting and disclosure requirements, pre-1975 plan descriptions and summary plan descriptions are not pertinent.

[8] Classes of employees and retirees were listed in an addendum to the underlying plan document, but this listing does not aid Curtiss-Wright in defending a claim based exclusively on the summary plan description.

[9] These vague and ambiguous statements violate both the letter and the spirit of § 1022. However, the applicability of the act is questionable

As to the plans in existence from 1975 to 1983, no summary plan descriptions applicable to retirees have been produced. What has been placed into evidence before this Court is the summary plan description applicable to active employees, an undated document entitled "The Curtiss-Wright Executive Post-Retirement Health Benefits Program," and summary annual reports for the years 1979 to 1983. This Court cannot grant summary judgment for or against either party herein on a claim of breach of § 1022's disclosure requirements applicable to summary plan descriptions from 1975 to 1983 when the pertinent underlying documents on which this claim is based are not in evidence. Even for the summary plan document issued in 1973, which may be considered to have remained in effect until 1975, questions of fact exist as to its applicability to that time period. Moreover, if these documents are not ever produced, but reliance is paced on the provisions in the booklets produced applicable to active employees, questions of fact as to their applicability to retirees exist, precluding the granting of summary judgment at this state in this proceedings. There may be a time, however, that conclusions of law could be made without these documents, if and when parties determine copies of these documents cannot be found. Accordingly, as to that group of the plaintiff class who retired between 1975 and 1983, the cross-motions for summary judgment on Count I are denied.

Those employees who retired prior to 1975 are not automatically excluded from recovery for a violation of § 1022 just because they left employment prior to this time. In addition, proving that the summary plan documents issued between 1975 and 1983 violate § 1022, for this group of employees who retired before 1975 to recover damages or retroactive benefits for defendant's noncompliance with § 1022, the Court finds that they must make a showing of active concealment or establish reasonable or significant

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because the medical-surgical portion of defendant's plan was changed on January 1, 1975.

reliance upon or possible prejudice flowing from the inadequate summary plan description.[10] *See Govoni*, 732 F.2d at 252; *Genter*, 776 F.2d at 550. There is no evidence in the record of active concealment. Plaintiffs do not contend that Curtiss-Wright refused to let participants examine or obtain copies of the plan. Rather, the plaintiffs will need to adduce evidence of reliance or prejudice. The Court notes that the prejudice one would anticipate appearing in the record would be the retirees' inability to obtain other medical coverage. However, what is clear from the record is that all retirees whose insurance was terminated were given the option of converting their coverage into an individual plan, which is costing them money and where deductibles may be higher. *See* Lewis Aff. of 3/14/86, Exh. C.

Accordingly, the Court grants summary judgment to defendant finding as a matter of law that defendant did not violate § 1022 as to the plaintiff subclasses of employees who retired after April 1983. As to the claim of breach of § 1022 by the subclasses of employees who retired either before 1975 or between 1975 and 1983, the cross-motions for summary judgment are denied because the record as it stands is incomplete and accordingly genuine issues of material fact exist precluding summary judgment.

2. Breach of Fiduciary Duty

Plaintiffs also claim in Count I that Curtiss-Wright breached its fiduciary duty under ERISA by terminating their post-retirement health benefits. This Court finds that plaintiffs cannot as a matter of law make out a claim for breach of fiduciary duty and that summary judgment will be granted to defendant.

Clearly, Curtiss-Wright breached no fiduciary duty when it discontinued previously offered nonvested, nonaccured benefits which ERISA does not prohibit a company from elimi-

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[10] This prerequisite to recovery of damages under § 1022, similarly applies to the subclass of plaintiffs who retired between 1975 and 1983. It is evident, however, that the burden on this subclass will be less onerous than that on the class of plaintiffs who retired prior to 1975.

nating. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, ____ U.S. ____, 107 S. Ct. 1893 (1987); *Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 410-11 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir. 1987). *Cf. Shenango China Div. of Anchor Hocking*, 750 F.2d at 279-80. Congress clearly authorized an employer to administer its pension and benefit plans and in doing so required it to satisfy the exacting fiduciary standards imposed by ERISA. Congress, however, did not prohibit an employer who is a fiduciary from changing or terminating nonvested ancillary benefits. *Id. See also* H.R. Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4935. Accordingly, summary judgment is granted to Curtiss-Wright on plaintiff's breach of fiduciary duty claim.

B. Counts I and II—Federal Common Law Breach of Contract Claim

It is well settled that "federal courts are empowered to create a federal common law of pension plans under ERISA, in order to effectuate Congress' intent to preempt the area and create a comprehensive federal regulatory scheme." *Carl Colteryahn Dairy, Inc. v. Western Pennsylvania Teamsters & Employers Pension Fund*, 847 F.2d 113, 121 (3d Cir. 1988) (citations omitted). *See also In re White Farm Equipment Co.*, 788 F.2d at 1191 (federal court must develop its own rule of decision in cases involving welfare plans where ERISA itself furnishes no answer). A federal court should exercise its power to create federal common law based on a federal statute's preemption of an area only where the federal statute does not expressly address the issue before the court. *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986) (citing C. Wright, *Law of Federal Courts* § 60, at 283-84 (3d ed. 1976)). For example, at least one court has found a common law breach of contract claim based solely on the language of the employer's summary plan description cognizable under ERISA and, thus, governed by federal common law. *See*

Amato v. Western Union International, Inc., 773 F.2d 1402, 1418 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986).

This Court held in its earlier decision in this case that health benefits are not accrued benefits which are subject to ERISA's nonforfeiture provisions. Nonetheless, the Supreme Court has concluded that ERISA's broad preemption clause, 29 U.S.C. § 1144(a), establishes that welfare benefit plans are a concern of federal law exclusively even though ERISA itself may not expressly govern the issue. *See Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985); *Shaw*, 463 U.S. at 98-100. Accordingly, federal common law governs the question of an employer's right to terminate a welfare benefit plan under ERISA. *In re Reading Co.*, 72 Bankr. 258, 260 (E.D. Pa. 1987).

Plaintiffs' federal common law breach of contract cause of action in Count II and their breach of plan documents claim in Count I are of a similar nature, and will be addressed together. The subclasses of plaintiffs retired before April 1983 seek summary judgment on Count II on the grounds that Curtiss-Wright's promise to pay post-retirement health insurance benefits became binding once the plaintiff subclass provided substantial service to the corporation. These subclasses of employees allege they acquired a contractual interest in these benefits arising from the presence of a unilateral offer given by the employer and the acceptance by way of continued employment and eventual retirement by the employee, which contract was breached by defendant's discontinuance of these benefits.

These plaintiffs also seek judgment on Count I asserting that while welfare benefits do not vest, they are considered status benefits which carry with them an inference that they will continue so long as the prerequisite status is maintained unless there is an express provision in the plan making continuation of these benefits contingent upon specific events. Thus, plaintiffs claim that defendant's failure to expressly reserve its right to terminate insurance benefits prior to April 1983 violated the express terms of the plan documents. In essence, the Court interprets both of these breach of contract allegations, as distinguished from plaintiffs' claim premised

on defendant's alleged breach of its disclosure obligation under § 1022, as stating a federal common law claim for breach of contract arising out of defendant's express representations—both written and oral—that defendant's post-retirement health benefits would continue throughout an employee's retirement.

In opposition, defendant argues that it never offered lifelong benefits to its retirees, and thus plaintiffs' claim must fail as a matter of law. In the alternative, defendant contends that if the Court finds such an offer was in fact made, plaintiffs cannot succeed on this claim because they have not met their burden of proof with respect to the other elements needed to establish an actionable contract claim, *i.e.*, acceptance, consideration or reliance under a promissory estoppel theory.

Separate and apart from the requirements of ERISA, courts have held that "parties may themselves set out by agreement or by private design, as set out in plan documents, whether retiree welfare benefits vest or whether they may be terminated. In construing such agreements, courts may draw inferences or make presumptions as . . . court[s] [have] done in construing collective bargaining agreements providing welfare benefit plans." *In re White Farm Equipment Co.*, 788 F.2d at 1193: *DeGeare v. Alpha Portland Industries, Inc.*, 652 F. Supp. 946, 959 (E.D. Mo. 1986), *aff'd*, 837 F.2d 812 (8th Cir. 1988) (interested parties may provide for either the vesting or the termination of retired employees' welfare benefits). Although ERISA does not prohibit reduction or elimination of welfare benefits, an employer may bind himself to provide these benefits by contract or estoppel. *Id.*; *McNabb v. Michigan Consolidated Gas Co.*, 656 F. Supp. 866 (E.D. Mich. 1987). For an employer to contractually bind himself, "there must be a specific, if not written, expression of the employer's intent to be bound." *Anderson v. John Morrell & Co.*, 830 F.2d at 877. In this context, the analysis involves not statutory construction, but contract interpretation, *District 29, United Mine Workers v. Royal Coal Co.*, 768 F.2d 588, 590 (4th Cir. 1985), and, where necessary, a consideration of rel-

evant extrinsic evidence and the parties' intent and course of dealing. *Local Union No. 150-A, United Food & Commercial Workers International Union v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985). *See also International Union, United Auto Workers v. Yard-Man, Inc.*, 716 F.2d at 1479-80. The dispositive inquiry is whether the employer intended to reserve the right to terminate benefits "in light of all the circumstances bearing upon the issue." *White Farm*, 788 F.2d at 1193.

The issue before the Court is whether Curtiss-Wright bound itself to continue plaintiffs' post-retirement health insurance benefits. Plaintiffs have the burden of showing that the parties intended retirees' benefits would be vested and not tied to the agreement which created them. *Dubuque Packing Co.*, 756 F.2d at 70.

In reviewing a denial of benefits, most courts of appeals have generally concluded that the judgment and interpretation of the plan administrator prevails so long as it is not arbitrary and capricious.[11] *See, e.g., Palino v. Casey*, 664 F.2d 854 (1st Cir. 1981); *Miles v. New York State Teamsters Conference*, 698 F.2d 593 (2d Cir.), *cert. denied*, 464 U.S. 829 (1983); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003 (4th Cir. 1985); *Dennard v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Wolfe v. J.C. Penney Co.*, 710 F.2d 388 (7th Cir. 1983); *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149 (9th Cir. 1986); *Peckham v. Board of Trustees of the International Brotherhood of Painters Union National Pension Funds*, 653 F.2d 424 (10th Cir. 1981); *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518 (11th Cir.), *cert. denied*, 474 U.S. 995 (1985): *Maggard v. O'Connell*, 671 F.2d 568 (D.C. Cir. 1982). *See also* Bruce, *Pension Claims: Rights and Obligations* 318 nn.87 and 88 (1988) and cases cited therein.

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[11] Some decisions set forth the full standard of "arbitrary and capricious, not supported by substantial evidence or erroneous on a question of law," while others simply state the standard as "arbitrary and capricious."

An alternative to or modification of the arbitrary and capricious standard has recently been adopted by the Third Circuit in *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134 (3d Cir. 1987), *cert. granted*, 108 S. Ct. 1288 (April 4, 1988). The *Bruch* court adopted a stricter standard of review, applying traditional principles governing construction of contracts in cases involving the denial of benefits to a group of employees by an "interested" employer/administrator of an unfunded pension plan. *Id.* at 145. A main concern of the court was that previously courts had routinely applied the deferential arbitrary and capricious standard "without stopping to ascertain whether the plan's funding obligations gave the plan administrator an interest adverse to the claimants with respect to the question whether benefits should be paid." *Id.* at 139.

The deferential arbitrary and capricious standard is a product of the law of trusts and the principle that the trustee must act solely for the benefit of beneficiaries. *Id.* at 141 (Restatement (Second) of Trusts § 170). An exception exists to this deferential standard when a conflict of interest threatens the trustee's impartiality. *Id.* Similarly, the *Bruch* court found dissatisfaction with the arbitrary and capricious standard in those contexts where the employer can profit from its decision to deny benefits. *Id.* at 140. Thus, the court found that in the absence of the safeguards which are present in the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)[12], which has also adopted the arbitrary and capricious standard for judging administration of pension plans for unionized employees, this standard should apply in only some ERISA contexts. *Id.* at 140.

The line which the *Bruch* court drew for when this standard should and should not apply is the same approach utilized in

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[12] Under § 302(c)(5) of the LMRA, employees and employers must be equally represented in the administration of pension and welfare funds and in the case of a deadlock on the administration of such a fund, the two groups will agree upon an impartial umpire to decide the dispute and if one cannot be selected, one will be appointed by the court. *See* §§ 302(c)(5) and 302(c)(5)(B).

the early LMRA cases: What is the employer's interest in these benefits? In the case of contractual benefits, an administrator's decision should be given *de novo* review, whereas with equitable benefits, the court should be more deferential. *Id.* at 141. The concerns of the court in *Bruch* regarding impartiality were described as follows:

> In the unfunded pension plan at issue in Count I of the complaint in this case, however, there is no assurance of the trustee's impartiality. The plan is controlled entirely by the employer, not by a group evenly divided between employer and employees. Because the plan is unfunded, every dollar provided in benefits is a dollar spent by defendant Firestone, the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket. As we have already seen, the [abuse of discretion] principle articulated in § 187 does not govern judicial review of such a trustee's decisions.

Based on the above, the Third Circuit in *Bruch* concluded that "[t]he principles of trust law instruct that when a trustee is thought to have acted in his own interest and contrary to the interest of the beneficiaries, his decisions are to be scrutinized with the greatest possible of care." *Id.* at 145. Since the trust at issue there provided severance benefits, a form of wages, the court determined that in construing the parties' agreement, it would utilize principles governing contract construction between parties bargaining at arms' length. *Id* at 145. Such an analysis dictated a middle course between the construction of the document offered by both sides, giving consideration to manifestations of the parties, current industry practice and past practice under the plan. *Id.* at 145-47.

The question before this Court is whether the employer here, who is also the plan administrator, had a personal interest which was adverse to the claimants or whether the party who is alleged to have benefitted from the challenged decision is not a beneficiary. If such is the case, *Bruch* governs.

If, on the other hand, the Court is presented with a situation where the trustee's decision aided one group of beneficiaries at the expense of another, or involved investment decisions where no conflict of interest was alleged, or concerned a plan administrator's decision to change the terms of a plan by offering different or fewer benefits, the *Bruch* court has made it clear that deference to the trustee's decision remains appropriate.

> Our decision today is also not meant to address the scope of judicial review accorded a plan administrator's decision to change the terms [of] a plan, by offering different or fewer benefits. *See Baker v. Lukens Steel Co.*, 793 F.2d 509 (3d Cir. 1986). An employer's freedom to alter the terms on which it offers employee compensation may well be broader than its discretion to construe those terms while they remain unchanged—and after they have induced reliance, as the terms of employment normally will.

Id. at 144 n.11. Similarly, subsequent Third Circuit decisions have noted that they do not understand the newly enunciated standard in *Bruch* to apply in a situation involving "personal claims for benefits." *Stiffler v. Equitable Life Assurance Society*, 838 F.2d 78, 83 n.7 (3d Cir. 1988). Since this Court finds genuine issues of material fact exist as to plaintiffs' federal common law breach of contract claim in Counts One and Two, this Court need not, at this juncture, determine which standard is more appropriate in this case. This approach, while cautious, is appropriate in light of the fact the Supreme Court has granted certiorari in the *Bruch*, case which it will hear and decide in its upcoming term.

From the institution of post-retirement health benefits in 1966 until 1971, booklets were issued stating that these benefits terminate upon (l) eligibility for medicare benefits, (2) the covered retiree's death, or (3) termination of the group *policy*. Pl. Statement of Uncontested Facts, Exhs. B and C (emphasis added). The clear meaning is that upon termination

of defendant's group policy with Liberty Mutual, benefits would be terminated. However, these booklets were far more specific as to termination of coverage than the underlying certificates of insurance. From 1971 until 1973 it is unclear what, if anything, employees were told as to termination of these new benefits. What is clear is that coverage riders concerning this period, which have been provided the Court, fail to reserve the right to terminate these benefits. According to the new summary plan description issued for the Blue Cross and Blue Shield coverage period from 1973 to 1975, the termination of benefits provision provided that "benefits will continue throughout an employee's retirement" or until the "class of persons of which you are a member ceased to be covered." *Id.*, Exh. E. The right of termination was limited to this narrow grounds of termination of benefits to the class of persons of which the employee is a member, with these classes nowhere defined except in a schedule outlining the class of employees eligible for coverage. These classes grouped retirees together and then split them up according to those retired before and after 1973. These categories did not distinguish retirees according to what plant they retired from.

In September 1976, upon changing insurers, defendant established a funded employee benefit plan for the purpose of providing for the payment of life, health and other employee benefits. Under the language of this plan, which is still in effect, the defendant reserved the right to modify or amend the plan. In addition, in the Plan's constitution the company reserved the right to terminate the Plan "for any reason at any time." England Aff., Exh. H at 5-7. New booklets were provided at this time, but none applicable to retiree classifications have been proffered to the Court. The booklet applicable to active employees has been provided the Court and reserves termination to (1) discontinuation of employment, (2) ceasing to be a member of a class eligible for coverage under the plan, and (3) discontinuation of the plan. Other summary descriptions of benefits issued after 1973 up through 1978 contained

no reservation of the right to terminate. However, summary annual reports for the years 1979 to 1983 did contain the general statement that the company reserved the right to discontinue or amend the plan.

Unable to resolve this question on the basis of the ambiguous contractual language recited above, the Court must look to extrinsic evidence to see if summary judgment should be granted. In addition to plan documents, the parties have presented deposition testimony and other documentation relevant to the question of whether Curtiss-Wright reserved the right to terminate medical benefits for pensioners.[13] Certain statements made by defendant's management or agents may have led employees to believe that they had contracted for a lifelong medical insurance plan. One plaintiff, William Litke, testified under oath that he was told at his exit interview that hospitalization benefits would continue "for the rest of his life." *Id.*, Exh. A at 17-18. John Dunning was similarly told during his exit interview with Mr. Kochinach that he would have hospitalization coverage "for the rest of [his] retirement." Alito Aff. of 6/26/88, Exh. C at 17-18. William Martone stated at his deposition that both Messrs. Foster and Cerami of defendant's personnel office reassured him, in the context of retirement concerns, that his wife would be covered by hospitalization until he was dead. *Id.*, Exh. E at 29-32. William Hanzalek stated at his deposition that he was told in his exit interview that he would have basic medical coverage for his retirement, which he understood to mean for the rest of his life. *Id.*, Exh. D at 40.

Other plaintiffs testified at their depositions that they turned down other employment opportunities because of the pay and benefits, including retirement benefits offered by Curtiss-Wright. *Id.*, Exh. E at 27. Others recall, while active employees, announcements by company executives that raises

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[13] The existence of this extrinsic evidence clearly distinguishes the instant action from that before the court in *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325 (3d Cir. 1984), wherein the court's inquiry was limited to written documentation.

would be small or none would be given at all while reminding the employees, as incentive to stay on, of the good benefits provided by Curtiss-Wright both now and at their retirement. *See, e.g., Id.*, Exh. E (W. Martone) at 47-48; *Id.*, Exh. H (G. Abbamont) at 14-17; *Id.*, Exh. J (J. Colquhoun) at 19-21. Joseph Colquhoun, who was President of the Supervisory Council at Curtiss-Wright, recalls these "belt-buckling" talks by company executives as well as a one-on-one talk with the manager of personnel who told him that while raises were a problem the employees all had benefits which were good at retirement as well as during active service. *Id.*, Exh. J at 21.

Most telling, however, is the deposition testimony of Embra Foster, the Manager of Personnel at Curtiss-Wright's Wood-Ridge facility during some of the time relevant to the complaint. Mr. Foster testified that he had a set statement he gave retirees during their exit interviews, which included the representation that although certain medical benefits would stop upon retirement, other hospitalization benefits "would continue." Lewis Aff., Exh. B at 63-75. He stated that it was his understanding that these benefits would continue for life, and he told this to retirees. *Id.* Although he often remained vague in his statement and would just say the benefits "would continue," if asked he would specifically say they would continue for life or for retirement. *Id.*

Under these circumstances a more detailed inquiry into the effect of management representations is required. The Court believes that these deposition transcripts raise a material issue of fact that makes summary judgment inappropriate. It is well established that questions of intent, motive and credibility, all of which are brought into question here, are inappropriate for disposition by summary judgment. *Baker*, 793 F.2d at 572. Therefore, upon inspection of the plan documents and the extrinsic evidence and documentation relevant to plaintiffs' claim, the evidence does not unambiguously establish that Curtiss-Wright retained the right to terminate the medical benefits in effect for eligible pensioners. Acceptance of defendant's position would require the Court to ignore the

alleged representations made by defendant's agents to retirees at exit interviews and during employee meetings in which benefits were touted when raises were financially unfeasible. These representations raise genuine issues of material fact not only as to credibility and motive but also as to the reasonableness of plaintiffs' reliance on these statements. While there is still some question of whether defendant's plan documents may have met basic disclosure requirements under ERISA, all the documentation presented together with oral representations made by defendant's agents, clearly raise a genuine dispute as to whether these employees could have reasonably relied on the array of oral and written representations of the defendant, causing an injury remedial by ERISA, such that they are entitled to reinstatement of these benefits under a contractual or quasi-contractual theory.

For the reasons set forth above, the cross-motions for summary judgment on the federal common law contract claims raised in both Counts I and II are denied.

/s/ JOHN W. BISSELL
John W. Bissell
United States District Judge

DATED: August 12, 1988

Appendix H

Decision of the District Court on In Limine Motions September 19, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 84-4542

FRANK C. SCHOONEJONGEN, et al.,

Plaintiffs,

—vs—

CURTISS-WRIGHT CORPORATION,

Defendant.

Newark, New Jersey
Wednesday, September 19, 1990

MOTION

Before:

HONORABLE JOHN W. BISSELL,
United States District Judge

Appearances:

LEWIS, GREENWALD, KENNEDY, LEWIS,
CLIFTON & SCHWARTZ, ESQS.,
BY: THOMAS KENNEDY, ESQ.,
—and—
IRA CURE, ESQ.,
Attorneys for the Plaintiffs.

CARPENTER, BENNETT & MORRISSEY, ESQS.,
BY: ROSEMARY ALITO, ESQ.,
—and—
KEVIN DUFFY, ESQ.,
Attorneys for the Defendant.

AARON J. CARR, ESQ.,
Attorney for Defendant.

Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record taken stenographically in the above entitled proceedings.

/s/ IRA N. RUBENSTEIN
Ira N. Rubenstein
Official Court Reporter

(Brief recess.)

THE COURT: Mr. Kennedy I think quite properly cautioned the Court about not focusing too narrowly and too exclusively just on the given word in a given case as being a bible for all issues. And I am mindful of that mention. It makes very good sense.

On the other hand, the Hozier case, whether one credits it fortunately or not is in many respects a blueprint of current Third Circuit thinking on a number of issues that are right at the very heart of the present litigation. For this Court to strain for one reason or another, either to distinguish Hozier or to adopt a wait and see attitude as to whether this particular case fit the Hozier tracks like a glove, I think would do a disservice to all litigants here, either in connection with the time and scope of this trial, the approximate ultimate rulings of this Court or, perhaps, the vulnerability of any decisions

which I might reach on Third Circuit review. I'm not going to be laborious here.

If I feel at some point during the course of the case a more extensive opinion on the issues are required, I have a right under the rules to supplement this oral opinion. The motion to dismiss the claim for promissory estoppel is granted.

I think that—excuse me—let me back up a minute. The Hozier case sets forth very clearly the unavailability of such a claim except in extraordinary circumstances. I do not agree with Mr. Kennedy that Hozier is to be strictly confined to circumstances where the argument advanced by way of promissory estoppel would, indeed, amended or somehow change the plan as opposed to supporting a different sort of argument. Indeed, of course, it is the defendants' arguments here that the promissory estoppel claim would do just that by amasculating the ability of the defendant in the area of welfare health benefits, non-vested benefits under ERISA to amend or terminate the same.

I think the distinction, in other words, that Mr. Kennedy draws is a distinction without material difference.

Secondly, we certainly don't have a Rosen case here in terms of looking for a comparable example of extraordinary circumstances. Rosen, frankly, in this Court's view, was almost ludicrous for the defendants there which included, I believe, the planned trustee himself to argue that where the employee had made contributions, that the employer has failed to make in order to keep its coverage alive, that that variation from the plan, because the employer made them rather and the employer deprived him of benefits.

What we really had there seems to me something in the nature of evidentiary estoppel indicating the defendants there would not be permitted in good conscience to take such a position before the Court. Here we would. The plaintiffs would seek essentially to establish by doctrine of promissory estoppel a separate contractual agreement which it would then perceive to enforce, I think both on its equities, at least on that nuance, if not otherwise, the Rosen is distinguishable.

Finally, I note that once again because it's a distinction drawn in the ERISA plan it's that Rosen involved pension benefits. If there is a stronger policy, as does appear to be under ERISA, towards vesting and none for the nature of pension benefits, Rosen, of course, serves that end. This is not a pension benefits case, as we all know.

The Court also grants the motion I will say, will mention one caveat: This, of course, is a preliminary ruling by the Court. I suppose in the nature of partial summary judgment. Although it might also be classified in the nature of a Rule 12(b)(6) motion in light of the—it's involving predominant issues of law which are highlighted in the Hozier opinion.

But as an interrogatory ruling it is not entirely preclusive. I note that only to the following extent. If in the course of the emergence of the evidence, particularly with regard to the proofs offered by the plaintiff, some facts or patterns begin to emerge where an argument might be renewed that we are dealing here with truly extraordinary circumstances, such as Rosen might have contemplated or other conceivable examples might illustrate, I would not preclude the plaintiffs from advancing once again an argument probably at or about the close of their proofs that such extraordinary circumstances had been established. I don't think that would significantly alter the progress of the hearings that would have to take place in this case. And so there is at least that one I must conceive in my own mind, remote possibility of the reemergence of the extraordinary circumstances.

I don't foresee it, I don't perceive it on the record presently before me. What I anticipate will be the record at trial for which we are all really quite familiar.

Secondly, any claims for the relief of the type sought by the plaintiffs here based upon a claim on the non-disclosure provisions of ERISA per se is also dismissed.

Once again, I feel that the Hozier analysis is complete. Pertinent, of course, in this Court, if you will. The analysis beginning at page 29 of the slip opinion which raises even the prospect of an employee failure to take his own steps to fill

gaps in the coverage of which he was unaware because of non-disclosure.

Even if that type of case which the plaintiffs argue is present here, Judge Becker held very firmly no remedy of benefits are available under the non-disclosure provisions in light of the specific statutory language limiting those provisions to others.

Third, the Court rules that the Yardman rule with regard to any presumption of status benefits in the area of health benefits which this case is involved with, does not apply. The Court will not endorse it. It will, of course, conduct this trial under a de novo review standard rather than disbuse of standard. Rule on the proofs as presented to him. But without the status benefits of presumption in this field, Yardman might intimate.

Finally, with regard to the issue of burden of proof concerning the terms of the respective plans and the strength of the sources of those proofs. This Court specifically declines to rule on that issue at this time. It is not crystal clear by any means under the cases that have come before the Court. Some of it may hinge, as it often does, under the Rules of Evidence with regard to whether there are amicabilities of whether one side or the other to have this evidence, have it preserved. Mindful, of course, that as to general proposition, the burden of proof by a preponderance of the credible evidence lies with the plaintiff.

Nevertheless, perhaps an argument can be made in terms of the reservation of rights to terminate that in the nature of a defense upon which the defendant may ultimately bear the burden of proof.

Another, if you will, of course, the contrary of that argument is that whereas here we are dealing with health benefits where the vesting provisions of the statute which deal with pension benefits do not apply. I can perceive an argument when the time comes raised by the defense that what remains and will remain the burden of the plaintiff throughout to prove a set of facts whereby the governing agreements estab-

lish virtually vested rights all through the statute would not require that. Those are issues which I think the Court cannot resolve at this time. They may be academic in light of the evolution of the proofs.

I know there are numbers of exhibits to be introduced by consent. They can be argued, I think, when the plaintiff formally rests. And I will say that I would not work a hardship on the plaintiff under its own exceptions where the burden of proof lay. I would—of course, I wouldn't preclude the possibility of reopening the plaintiff's case to give him an opportunity to comply with any Court ruling on the issue. I don't believe that leaves anything in connection with these motions for my adjudication on Friday morning. Accordingly, I'll be prepared to begin the trial that morning.

In light of not only these motions but the history of this case, I don't feel the need for oral opening statements on the other hand, unless, again, I don't preclude it. Particularly if the plaintiff would like to give this Court a bit of blueprint for its proofs and the witnesses who will be coming before the Court and, perhaps, the order of those witnesses certainly wouldn't preclude it. I'm just not saying.

THE COURT: Anything further before we adjourn?

MR. KENNEDY: I have one question, your Honor, that I believe is implicit in your comments. I wish to make it clear for purposes of preparing now and Friday.

Ms. Alito mentioned presentation. There it would be her contention the promissory estoppel claim were dismissed that evidence plaintiffs would offer regarding oral promises made to them and the documents that they have received would be inadmissible because they would not be within the terms of the plan.

It has been my understanding of the thrust of your ruling today, reading between the lines, your Honor, that you were not attempting, were not ruling the plaintiffs were unable to present evidence of those oral representations.

THE COURT: Not at this time. It may be that the most orderly pattern of proof presentation—I commend this only

for your consideration at this time—would be the introduction into the record formally of whatever documents existed during whatever relevant time periods, so that the Court, once again, now in this trial context can take a look at those, once again advise you what areas I feel there is ambiguity there isn't.

What areas I feel there are gaps and proof of the written documents to be supplied, perhaps, either by related writings or testimony. So that a clearer focus on those areas of the presentation of evidence outside the plan documents or SPDs themselves can be presented by me to you, but I am certainly not at this point, precluding you in advance of the presentation of the sort of evidence that you have mentioned, including what you had argued would be a pattern of interpretation of this agrees and exit interviews. It's that very type of evidence was considered appropriate in the Hozier opinion.

MR. KENNEDY: Yes, it was your Honor. I just wish to clear that up.

THE COURT: Thank you. Anything further, Miss Alito?

MS. ALITO: No, Judge.

THE COURT: All right. We'll see you 9:30 Friday morning. That will be our normal starting time for our trial days. I'll also advise you on Friday of any minor intrusions here and there along the way in our trial schedule. We have already discussed that somewhat in the past and I'll have a clearer picture for you on Tuesday morning. We're adjourned until that time.

(Matter adjourned.)

Appendix I

Judgment entered by District Court
(November 25, 1992)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 84-4542

FRANK C. SCHOONEJONGEN, *ET AL.*,

Plaintiffs,

—against—

CURTISS-WRIGHT CORPORATION,

Defendant.

LEWIS, GREENWALD, KENNEDY, LEWIS,
CLIFTON & SCHWARTZ, P.C.
Attorneys for Plaintiffs
355 Murray Hill Parkway
East Rutherford, New Jersey 07073
(201) 933-9494
(212) 382-0029

JUDGMENT

This action having been tried on liability issues only before the Honorable John W. Bissell on September 21, 25, 26, 28 and October 1, 2 and 3, 1990; a decision on liability having been entered into the record on October 4, 1990 a copy of which is annexed hereto as Exhibit A:

The parties having stipulated only as to the amount of damages inclusive of prejudgment interest that will be due to the class if Judge Bissell's decision on liability is affirmed on appeal; and that amount and method of distribution of that amount among the class members having been subject to notice and hearing and approved by the Court on November 9, 1992 as per the schedule annexed hereto as Exhibit B;

IT IS ORDERED AND ADJUDGED that the plaintiff class shall recover the sum of $2,681,086 inclusive of prejudgment interest and that postjudgment interest shall accrue in the manner set forth in 28 U.S.C. §1961;

IT IS FURTHER ORDERED AND ADJUDGED that the $2,681,086 shall be allocated to the members of the plaintiff class in the manner set forth in Exhibit B;

IT IS FURTHER ORDERED AND ADJUDGED that if at the time of distribution plainttiffs' counsel is unable, after a six-month period during which due efforts are made, to locate any class members, the money allocated to those unlocatable class members shall be distributed per capita among those remaining; and

IT IS FURTHER ORDERED AND ADJUDGED that there shall be a separate determination regarding plaintiffs' entitlement to attorneys' fees and costs.

/s/ JOHN C. LIFLAND
John C. Lifland, U.S.D.J.

Dated: November 20, 1992

Appendix J

Order of the Court of Appeals on Petition for Rehearing (March 3, 1994) Filed March 3, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 92-5695 and 92-5710

FRANK C. SCHOONEJONGEN; WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated

v.

CURTISS-WRIGHT CORPORATION

Appellant in No. 92-5695

Frank C. Schoonejongen, Wesley L. Losson, John S. Dunning, William Martone, William V. Hanzalek, Edward F. Ziek, Melvin Deblock, Joseph Colquhoun, Joseph Majerscak, Gerard Abbamont, and Olga Wolsey, on their own behalf and on behalf of the class of persons they represent,

Appellants in No. 92-5710

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 84-04542)

Argued September 10, 1993

BEFORE: STAPLETON, ROTH and LEWIS,
Circuit Judges

ORDER

IT IS ORDERED that:

1. The petition for panel rehearing in No. 92-5695 is granted.

2. The opinion filed on December 28, 1993, is hereby vacated.

3. A revised panel opinion is hereby issued in the form attached to this Order.

4. The pending petition for rehearing before the full court in No. 92-5695 will be acted upon in due course following circulation of the attached amended opinion. This Order is without prejudice to the filing of a petition for rehearing addressed to the new portions of the attached opinion.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: March 3, 1994

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix K

Order of the Court of Appeals on Petition for Rehearing in Banc (March 14, 1994)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-5695

FRANK C. SCHOONEJONGEN, WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated,

—v.—

CURTISS-WRIGHT CORPORATION,

Appellant

SUR PETITION FOR REHEARING

Before:

SLOVITER, *Chief Judge*,
BECKER, STAPELTON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH,
and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to all the available circuit judges of the circuit in regular active service, and a majority of the circuit juges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ WALTER K. STAPLETON
Circuit Judge

Dated: March 14, 1994

Appendix L

Judgment of the United States Court of Appeals for the Third Circuit (March 3, 1994)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 92-5695 and 92-5710

FRANK C. SCHOONEJONGEN, WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated,

—v.—

CURTISS-WRIGHT CORPORATION,

Appellant in 92-5695.

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 84-04542)

FRANK C. SCHOONEJONGEN, WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated,

—v.—

CURTISS-WRIGHT CORPORATION,

Frank C. Schoonejongen, Wesley L. Losson; John S. Dunning; William Martone; William V. Hanzalek; Edward F. Ziek; Melvin Deblock; Joseph Colquhoun; Joseph Majerscak; Gerard Abbamont; and Olga Wolsey, on their own behalf and on behalf of the class of persons they represent,

Appellants in 92-5710.

Present:

STAPELTON, ROTH, and LEWIS, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on September 10, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered November 25, 1992, be, and the same is hereby affirmed. Costs taxed against appellants in each appeal. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ P. DOUGLAS SISK
Clerk

Dated: March 3, 1994

Costs taxed in favor of Appellees Frank C. Shoonejongen, et al in No. 92-5695 as follows

Total Costs $231.77

Certified as a true copy and issued in lieu of a formal mandate on March 25, 1994.

Teste: /s/ BRADFORD A. BALDUS

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit.

Appendix M

Stipulation of Facts from Final Pretrial Order and Stipulation of District Court (entered July 23, 1990; incorporated in Appendix C, Opinion of the District Court after Trial)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 84-4542

Filed July 23, 1990

FRANK C. SCHOONEJONGEN, et al.,

Plaintiffs,

—v.—

CURTISS-WRIGHT CORPORATION,

Defendant.

FINAL PRETRIAL STIPULATION AND ORDER

This matter having come before the Court at a pretrial conference held pursuant to Rule 16 of the Federal Rules of Civil Procedure and Lewis, Greenwald, Kennedy & Lewis, P.C. having appeared as counsel for the plaintiffs and Carpenter, Bennett & Morrissey having appeared as counsel for the defendant, the following Order is hereby entered:

1. JURISDICTION:

This Court has jurisdiction under Section 502 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1132.

2. STIPULATION OF FACTS:

Defendant Curtiss-Wright Corporation is a Delaware corporation which was and is qualified to do business in the State of New Jersey. Defendant operated a production facility at Wood-Ridge, New Jersey for many years prior to November 30, 1983.

The named plaintiffs and the members of the class are all former exempt and non-exempt employees of defendant who were employed at defendant's Wood-Ridge facility. At the time each class member retired from employment at the Wood-Ridge facility, he or she was not represented by any union for the purpose of collective bargaining.

Defendant first provided post-retirement health benefits in 1966. [Under that program, post-retirement benefits were terminated upon eligibility for Medicare.] These post-retirement health benefits were provided as part of Curtiss-Wright's group health insurance plan and were completely paid by defendant.

Defendant was and is the plan sponsor and administrator of this program. The post-retirement health benefits program is an employee benefit plan within the meaning of ERISA and subject to the provisions of that law.

Post-retirement health benefits were provided to retirees from the Wood-Ridge facility commencing in 1966. Benefits were provided to retirees whose retirement commenced before that date. However, coverage was not extended to the retirees from all Curtis-Wright operation facilities across the United States.

In 1976, defendant established a trust agreement and Constitution, and since that time benefits have been provided through a series of "cost-plus" contractual arrangements with various insurance carriers. This form of funding differs from a typical insurance contract in that, rather than paying a premium, defendant accepts responsibility for the payment of all

claims and pays the insurance carrier a fixed percentage of claims paid as an administrative fee. The payments made by defendant under this system are broken down by facility based upon each facility's claim experience to be charged to that facility's government contract. They are further broken down by whether the retiree was a bargaining-unit member or an exempt or non-exempt employee.

The benefits provided to retirees from defendant's Wood-Ridge, New Jersey facility were terminated as of November 30, 1983.

Post-retirement health benefits for certain retirees whose last active employment for defendant was in other facilities have been continued: post-retirement benefits for certain other retires have been terminated; and certain other retirees never received post-retirement benefits at all. Those benefits have also been continued for those retirees whose last active employment was at Wood-Ridge but were considered "corporate" employees rather than regular employees at the Wood-Ridge facility at the time of their retirement.

From the institution of the post-retirement health benefits program in 1966 to January 1, 1971, retirees' benefits were provided by defendant pursuant to a contract with Liberty Mutual Insurance Company ("Liberty Mutual").

In connection with the coverage provided during this period, certificates of insurance were distributed to eligible retirees (Plaintiffs' Exhibit 1). In addition, two booklets or pamphlets describing the coverage of the post-retirement health benefits program were distributed to active employees and retirees (Plaintiffs' Exhibits 2 and 3). Page 9 of the first booklet distributed contains the following language regarding termination of these benefits:

> *Termination of Insurance*
>
> Your insurance, or that of a dependant, will terminate if you, of such dependent, becomes eligible for Medicare benefits under the Federal Social Security Act, in the event of your death, or if the Group Policy terminates.

> There is no extension of insurance following termination of insurance.

Page 8 of the second booklet distributed to employees and retirees contains similar language regarding the termination of benefits but eliminates any reference to Medicare. This booklet provides:

> *Termination of Insurance*
>
> Your insurance, or that of a dependent, will terminate in the event of your death, or if the Group Policy terminates.
>
> There is no extension of insurance for dependents following termination of their insurance.

Effective on January 1, 1971, defendant's health benefits were provided pursuant to a contract with Prudential Insurance Company ("Prudential"). Defendant's contractual arrangement with Prudential in this regard continued through January 1, 1973. With respect to this two-year period of coverage, the only documents which have been located are Coverage Riders to the applicable but unlocated Group Policy (Plaintiffs' Exhibit 4).

From January 1, 1973 until January 1 1975, such benefits were provided through contractual arrangement with Blue Cross/Blue Shield.

Sometime after January 1, 1973, a booklet prepared by Blue Cross/Blue Shield was distributed to participants and beneficiaries by defendant (Plaintiffs' Exhibit 5). Page 4 of the booklet contains the following language regarding termination of these benefits:

> Termination of Benefits . . . Your benefits will continue throughout your retirement or until the date the class of persons of which you are a member ceases to be covered by the Program. A dependent's coverage terminates when your coverage terminates or on the last day of the

month in which he or she ceases to meet the qualifications of an eligible dependent. In the event of your death, your dependents will continue to be covered until the end of the calendar month following the month of your death. However, should you or any of your dependents be receiving covered inpatient care at the time your coverage terminates, benefits will continue to be provided to the extent available for that confinement.

Curtis-Wright provided these post-retirement health insurance benefits through a group contract with the Hospital Service Plan of New Jersey under which Blue Cross benefits were provided (Plaintiffs' Exhibit 6) and the group contract with the Medical Surgical Plan of New Jersey under which Blue Shield benefits were provided (Plaintiffs' Exhibit 7).

On January 1, 1975, the insurance carrier for the medical-surgical portion of the post-retirement health benefit program was changed from Blue Shield to Prudential. The group contract with the Hospital Service Plan of New Jersey ("New Jersey Blue Cross") (Exhibit G) remained in effect, but the Blue Shield group contract (Plaintiffs' Exhibit 6) was superseded by a group policy obtained from Prudential.

The Blue Cross/Prudential combination of carriers providing post-retirement health benefit coverage remained in effect through February 1, 1983. In September 1976, defendant established the plan Constitution and entered into an Administrative Services Agreement with Prudential (Plaintiffs' Exhibit 9). Benefits under that agreement were to be provided only to specified classes of retirees. Among the groups specifically set forth in the agreement are:

14. All full-time Exempt Retired Salaried Employees located in the United States.

15. All full-time Retired Employees (other than Employees of Target Rock Corporation and Marquette Metal Products Company, subsidiaries of Curtiss-Wright Corporation), who (i) are in bar-

> gaining units represented by unions with whom the Employer has entered into collective bargaining agreements or (ii) are classified as full-time non-bargaining non-exempt Employees

Employees and retirees of Curtiss-Wright Corporation did receive a summary plan description, apparently prepared by Prudential, which describes the various benefits provided through that company to active employees (Plaintiffs' Exhibit 10). Post-retirement health benefits were described in various documents distributed by defendant between 1973 and 1983. These included summary plan descriptions, informal highlight sheets, letters, summary annual reports, and booklets.

Effective February 1, 1983, medical-surgical coverage with Prudential was terminated and a new contract with Blue Shield commenced. Hospital benefits continued to be provided through Blue Cross.

Sometime following the change to Blue Cross and Blue Shield on February 1, 1983, a new summary plan description booklet was distributed (Plaintiffs' Exhibit 13).

On November 4, 1983, defendant notified the retirees that Wood-Ridge facility would be closed at the end of the month and that the post-retirement health benefits were being terminated at that time for all individuals who retired from that facility.

(3)

Supreme Court, U.S.
FILED
JUN 29 1994
OFFICE OF THE CLERK

No. 93-1935

In The

Supreme Court of the United States

October Term, 1993

CURTISS-WRIGHT CORPORATION,

Petitioner,

v.

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Can an Employer Plan Sponsor that has disregarded the plain statutory mandate of Employee Retirement Income Security Act 402(b)(3), 29 U.S.C. 1102(b)(3) by failing to provide a procedure for accomplishing a plan amendment or to identify the persons with authority to amend the plan, informally redraft a Summary Plan Description and thereby deprive retired participants of lifetime health coverage? The Court below answered no.

Should an Employer Plan Sponsor which has implemented an unlawfully adopted amendment to an ERISA welfare plan purporting to eliminate lifetime health benefits to retired participants be required to disregard such amendment and provide those benefits to participants until such time as an effective amendment is actually adopted? The Court below answered yes.

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STATUTES

Employee Retirement Income Security Act (ERISA), Section 402(b)(3), 29 U.S.C. 1102(b)(3) ..... *passim*

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JURISDICTION AND STATUTORY PROVISION

Respondent adopts the Statement of Opinions Below and Jurisdiction as set forth in the Petition. The Statement of Statutory Provisions Involved is accepted except to the extent other sections of ERISA are cited below.

COUNTERSTATEMENT OF THE CASE

The Petitioner misapprehends and hence misstates the record below in several important respects:

First, the Petition refers to "the amendment at issue" and "the 1983 amendment" (Pet. 5). But throughout this litigation Petitioner denied that the language added to the 1983 Summary Plan Description was intended to amend its welfare plan. The process had been so casual and haphazard that the Curtiss-Wright witnesses differed as to who had actually prepared the plant closure language. (Compare J.A. 1141 with J.A. 1237). The District Court held that:

> Indeed, in this case the purported amendment was not even considered by Curtiss-Wright to be an amendment at all. Of course, I have ruled to the contrary. Here it was done as a matter of routine redrafting, and is therefore not effective. A.38

Second, the Petition erroneously asserts that the District Court entered judgment for Respondents solely "because the plan did not provide an amendment procedure" (Pet. 6). While the District Court did find that the Plan violated ERISA 402(b)(3) because "there were no

written procedures for amendment of the plan", the Court also considered testimony by Curtiss-Wright that "there may have been an unwritten procedure for amending the plan involving the submission to a certain executive committee" (A.38). The District Court squarely held that, "as the defendant admits, even those procedures were not followed in the case of the 1983 amendatory language" (*Id.*).

Third, the Petition elevates the status of the Summary Plan Description (SPD) issued in 1983 to that of a "governing document" (Pet. 5) definitively declaring the rights and obligations of all plan participants. But the 1983 SPD expressly disclaims authoritative status. The SPD states in response to the question "what are Summary Plan Descriptions" that

> the complete terms of the coverages are set forth in policies issued by the insurance companies that underwrite the insured benefits and in the plan documents of the other welfare and pension plans. *In case of conflict, the terms of the* group insurance policies and *plan documents will prevail* (emphasis added) (J.A. 681).

Therefore, neither the plan sponsor nor participants could rely upon language inserted into the SPD as authoritative.

THE REASONS FOR DENYING A WRIT OF CERTIORARI

Petitioner raises arguments neither relevant to the vast majority of ERISA plans nor well grounded on the facts of this case as found by the courts below. Only

determined and persistent corporate incompetence – unlikely to be duplicated by other plan sponsors – explains Petitioner's initial decision to deprive its retired participants of critically important health care coverage through an act of casual redrafting instead of through a more formal corporate act. It is not too much to expect strict adherence to plain statutory requirements when benefits of this importance are being taken from the sector of our population most vulnerable to health care crises.

The decision below crafts a well-balanced rule which protects both plan sponsors and participants. Plans with amendment procedures are required to follow them. Plans that do not designate persons with authority to effectuate amendments and provide procedures therefor are required to adopt them. Only plan sponsors which have adopted amendments modifying participant benefits by casual, informal means are at any risk by the decision below. The decision does nothing more than sensibly enforce the plain language of the statute.[1]

The remedy ordered flows naturally from the violation found. Petitioner's reservation of the right to amend its plan was upheld and it eventually did amend. Money damages were limited to the period dating from the improper termination of retiree health care benefits to the

---

[1] In *In re Unisys Corporation Retiree Medical Benefits ERISA Litigation*, MDL No. 969, (E.D.Pa. June 23, 1994), Judge Cahn commented that Respondent "had won a hollow victory; Curtiss-Wright needed only to adopt an amendment procedure, amend the plan pursuant to that procedure and then terminate whatever benefits it so chose." Slip op. pp. 57-58.

adoption by Petitioner's Board of Directors of a plan amendment effectively terminating such benefits. To do anything less would render the plain language of ERISA's fiduciary mandate a hollow reed.

I. This Case Is Not a Good Vehicle For Examining the Issues Posed by the Petitioner

Petitioner raises concerns that the decision below has immediate and serious consequences for ERISA plans. One answer is that the language of ERISA Section 402(b)(3) is so simple and plain that its enforcement as written should have been and presumably was anticipated by plan sponsors. But the unique facts of this case in which the District Court found that Petitioner never even purported to amend this plan, made no effort to satisfy even its own unwritten procedures and in the end changed only an SPD instead of an authoritative plan document make this Petition a poor vehicle for reviewing the issues posed by Petitioner. Such issues could better be determined where a prudent plan sponsor has acted carefully to amend a plan, in full recognition that an amendment was being made and through its organization's highest decision maker, e.g., a corporate Board of Directors. The simple fact is that Petitioner failed to adhere to those standards of prudence. A definitive ruling in this area should await a clearer factual premise.

II. There is No Split Among the Circuits

The Petition asserts an alleged split between the Third Circuit on one hand and the Fourth, Sixth and

Seventh Circuits on the other with respect to the meaning and application of ERISA § 402(b)(3). In fact, these Circuit Courts agree that a failure to comply with ERISA § 402(b)(3) does not render an ERISA Welfare Plan unamendable for that reason alone, but does subject a particular amendment to nullification if the evidence shows that its adoption was not in compliance with a formal procedure.

In *Adams v. Avondale Industries Inc.*, 905 F.2d 943 (6th Cir.) *cert. denied*, 498 U.S. 984 (1990), the Court considered the terms of a severance plan and concluded that Congress did not intend that "any plan failing to comply with [ERISA Sec. 402(b)(3)] would for that reason alone become unamendable". 905 F.2d at 949. But the language used by the *Adams* Court suggests that it looked to ensure that the putative plan amendments had been "promulgated" by the Company and even then presumed that there were some situations in which a substantive remedy of prohibiting amendment could be imposed in response to a defendant's procedural violations. *Adams* is not in conflict with the holding below.

The Fourth Circuit holding in *Biggers v. Wittek Industries Inc.*, 4 F.3d 291 (4th Cir. 1993) focused on whether a purported amendment to a severance plan had been adopted by the appropriate formal corporate acts. Since the facts showed that the plan could be adopted "only with the approval and signature of the President" and this did not occur, the court held that the employer could not contend the new plan was in effect due to "the absence of evidence manifesting actual adoption of the new draft". Again, no conflict with the Third Circuit.

In the only other case cited by Petitioner on this point, *Murphy v. Keystone Steel and Wire Co.*, No. 93-1247, 1994 WL 172252 (D.C. Ill. 1994), the District Court acknowledged that "Defendant does not cite and the court's research has failed to discover, any Seventh Circuit case dealing specifically with the application of the procedural amendment requirements of § 402(b)(3) to a plan void of any amending procedure". There is no split among the Circuits.

III. The Decision Below Strengthens ERISA's Fundamental Policies

It is common for parties who have failed to comply with a technical requirement of ERISA to justify their statutory departure by reference to the statute's "basic purpose" as though it gave license for violation of its clear terms. In *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed. 2d 161, 173-174 (1993), this Court rejected such an approach holding that

> vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of the test regarding the specific issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between competing interests – not all in favor of potential plaintiffs.

The irony is that in fact the decision below strengthens the policies Petitioner now claims are undermined.

A. The requirements that the Plan set forth an amendment procedure and identify the person who has the authority to effectuate an amendment are imposed by the statute

Petitioner argues that the decision below ignores the definition of a "person" in ERISA § 3(9), 29 U.S.C. 1002(9) which can include a corporation and imposes a requirement that the plan name the particular individuals who have amendment authority. But the decision acknowledges that Petitioner could have met its statutory obligation by specifying that the Board of Directors had the authority to amend the plan as is specified in other provisions in the 1976 Constitution. (JA 549) Given the clear statutory language, it is unlikely that Congress intended the process to be circular, i.e., for the plan sponsor to merely state that it reserved the authority to amend the plan without further explication of the procedures to be utilized or the body within the sponsoring organization empowered to effectuate amendments. Petitioner's contention would be compelling if the statute read "Every employee benefit plan shall . . . state whether the plan sponsor reserves the authority to amend the plan". But the statute is more specific and the obligations of a plan sponsor are not satisfied by the general reservation used by Petitioner.

B. The procedural remedy imposed is precisely calculated to rectify Petitioner's statutory violation.

The District Court determined that Curtis-Wright had properly reserved the power to amend its health benefit

plans and refused to grant Respondent's request for an injunction barring such a plan amendment (A.40). The Court of Appeals upheld this ruling (A.14-15). Respondents' damages for the elimination of their health care coverage continued only until November 1990 when the Board of Directors of Curtiss-Wright finally acted to adopt an amendment to its retiree health plan terminating benefits in the event of plant closure. Petitioner could at any point from 1983 onward have properly restated its plan to comply with ERISA § 402(b)(3) and then effectuated a proper amendment (A.11). Petitioner could also have acted through its Board of Directors at any point to adopt or ratify such an amendment. Its willful failure to act in conformity with the statute does not render the resulting damages "draconian".

Courts construing ERISA have frequently noted that substantive remedies are not available for violations of the reporting and disclosure sections of ERISA except in extraordinary cases of active concealment.[2] *See, e.g., Lewanowski v. Occidental Chemical Corp.*, 986 F.2d 1006 (6th Cir. 1993); *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 921 (3rd Cir. 1990); *Hozier v. Midwest Fasteners Inc.*, 908 F.2d 1155, 1170 (3rd Cir. 1990); *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517 (8th Cir. 1988). Those courts refused to amend the terms of a plan by granting participants substantive relief not contemplated by the terms of the plan, simply because of alleged reporting and disclosure violations. The decision below, however, does not grant

---

[2] ERISA 402(b)(3) is not within ERISA's reporting and disclosure sections but within title 4, its fiduciary obligations section.

respondents additional benefits but merely enforces the plan as written without reference to improperly adopted amendments. The damages awarded below represented nothing more than the cost of continuing plan retiree benefits until such time as the Petitioner acted lawfully to adopt an amendment.

Petitioner's argument finally falls on its mistaken assertion that Respondents did not suffer any harm arising from the underlying ERISA violations. Respondents were deprived of critical retiree health care benefits as part of a casual redrafting process. At no time did appropriate corporate decision makers recognize that they were changing the terms of the plan. Respondents were deprived of their right to have significant changes in plan benefits made by persons who by designation in the plan or state corporate law were real decision makers.

C. The Decision Below Has Little Effect on the Integrity of Plan Documents

Petitioners argue at length that *certiorari* is appropriate because the decision below invalidates a plan amendment that was incorporated in an SPD that was distributed to plan participants. But any reading of ERISA § 402(b)(3) can require this result. ERISA plans that set forth amendment procedures are required to comply with such procedures before amendments are effectively adopted. *Hozier v. Midwest Fasteners Inc.*, 908 F.2d 1155, 1170 (3rd Cir. 1990). It is not possible for the readers of the terms of an SPD to determine whether any amendment procedures exist and have been satisfied in connection with any particular terms. Any term in an SPD may

in fact have been adopted improperly and may therefore be ineffective; this is true whether the decision below is reversed or not.[3]

Whatever risk of uncertainty there may be is tolerable and within the delicate balance struck by Congress between the need for due process in the amendment of plan terms and the right of participants to full disclosure. Indeed, Petitioner in effect seeks the absurd result that plan sponsors who do comply with § 402(b)(3) by establishing an amendment procedure against which the effectiveness of an amendment can be measured – the result Congress surely intended – should be worse off than plan sponsors who establish no procedures at all.

---

[3] As noted *supra*, the SPD in this case provided that in the event of a conflict with plan documents, the plan documents would control.

CONCLUSION

For the foregoing reasons, the Petition for *certiorari* should be denied.

Dated: June 29, 1994

Respectfully submitted,

LEWIS, GREENWALD, KENNEDY,
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(5)

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No. 93-1935

IN THE

Supreme Court of the United States

OCTOBER TERM 1993

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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APP

IN THE

Supreme Court of the United States

OCTOBER TERM 1993

No. 93-1935

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

If plaintiffs had their way, this case would have been decided on different grounds below. To argue that this case is not the best vehicle for the questions presented, plaintiffs seek to confine the Third Circuit's decision to asserted facts that are either contrary to the record or immaterial. Their efforts serve only to highlight that this case presents the questions for which review is sought in their starkest form: The challenged construction and application of ERISA § 402(b)(3) overrides an expressly reserved right to amend, strikes a term from the plan documents, and restores employee welfare benefits that the plan sponsor had the acknowledged right to terminate.

Plaintiffs argue, for example, that the disputed amendment was incorporated only in a summary plan description and not

in a "governing document" of the plan. (Opp. Br. 2, 4). But the Court of Appeals accepted the District Court's finding to the contrary. The District Court specifically found that the 1983 revised plan description, incorporating the challenged amendment, was the plan document controlling the terms of the plan:

> The Court must . . . look to the 1983 booklet without [the invalidated] amendment as the governing document [of the plan].

(A.38).

There is no need to resolve the further issues plaintiffs try to inject. Plaintiffs make much ado about the testimony of the Curtiss-Wright executives who had drafted the amendment, distinguishing between a "clarification" of existing plan terms (because those terms already reserved Curtiss-Wright's right to terminate the plan for any reason at any time) and an "amendment" substantively changing those terms. (J.A. 1142, 1236-39). But this semantic conundrum is immaterial here. The District Court recognized that the revised language added to the plan, whether called an amendment or a clarification, was intended to be a plan term; the only difference was whether it substantively changed the plan. (App. 36-37). The revised language was incorporated in the "governing document" setting forth the plan terms,[1] (A.38); the District Court held that it was an amendment, (A.36); and the Third Circuit premised its decision on the revision's status as an amendment. (App. 6-7). No theoretical distinction between amendment and clarification affects the Third Circuit's analysis or the breadth of its holding.

To invalidate the amendment here, the Court of Appeals relied exclusively on its conclusion that the plan failed to

---

[1] While plaintiffs refer to this as "casual redrafting," the amendment was drafted and inserted into the plan by the same company executives who had established the plan constitution in 1976 and who were responsible for administering the plan. (J.A. 1141-42, 1204, 1235-36).

comply with § 402(b)(3), (App. 10-11), essentially acknowledging that the amendment met all other prerequisites of a valid amendment. (App. 9, n.4). Indeed, in other cases, the Third Circuit repeatedly had declined to decide the validity of plan amendments based on the absence of amendment procedures because it was not necessary to do so. (App. 9-10). Here, by contrast, it concluded that "this case requires that we now reach that issue." (*Id.*)

This case thus presents the questions for which review is sought without complication. Under the decision below, an amendment is invalid whether or not there is an express right to amend the plan, whether or not the amendment is incorporated in the plan documents distributed to participants, and whether or not the affected benefits are vested. This broad impact threatens countless plans and the sponsors, administrators, and other fiduciaries associated with those plans, and warrants this Court's review.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CURTISS-WRIGHT CORPORATION,
Petitioner,

v.

FRANK C. SCHOONEJONGEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Union Fire Insurance Company of Pittsburgh, PA ("National Union") respectfully moves this Court, pursuant to Rule 36.3, for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case. The consent of attorney for the petitioner has been obtained. The consent of attorney for the respondents has not been obtained.

National Union is one of the largest underwriters in the United States of insurance covering certain liabilities arising from claims under the Employee Retirement Income Security Act of 1974 ("ERISA"). National Union has issued a policy which covers certain ERISA-related liabilities of petitioner Curtiss-Wright Corporation. In addition, National Union has issued similar policies to

well over a thousand other employee benefit plan sponsors who may be exposed to liability if the decision below is not reversed. National Union therefore has a substantial interest in the outcome of this case. Moreover, the uncertainty engendered by the decision below as to the validity of current terms of employee benefit plans makes it more difficult for National Union to underwrite policies of insurance that cover ERISA-related liabilities. Unless the decision below is reversed, this difficulty will either increase the cost or restrict the availability of such insurance, thus harming the companies that sponsor employee benefit plans and making it less likely that they will continue to provide such plans.

National Union therefore requests this Court to accept the attached brief in support of the petition for certiorari in this case.

Respectfully submitted,

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July 1, 1994

QUESTIONS PRESENTED

1. Does ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), require an employee benefit plan to identify specific individuals within the sponsoring organization who have authority to amend the plan, or otherwise require an amendment procedure more detailed than that contained in a plan that expressly reserves the sponsor's right to amend the plan?

2. Does a procedural noncompliance with ERISA causing no harm to plan participants—here, the Court of Appeals held that a plan's amendment provisions were insufficiently specific under ERISA § 402(b)(3)—give rise to a substantive remedy—here, striking an amendment from the plan document to invalidate a termination of nonvested welfare benefits?

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BRIEF *AMICUS CURIAE* OF THE NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA IN SUPPORT OF THE PETITIONER

INTEREST OF *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth in the motion accompanying this brief.

SUMMARY OF ARGUMENT

On its surface, the decision below addresses only a narrow, apparently obscure issue of statutory interpretation. What a surface look does not reveal, however, is the sweeping impact of that decision in invalidating the terms of corporate-sponsored employee benefit plans and the wave of significant litigation that will be ushered in by the decision. Because the decision creates a conflict

among the circuits and advances a rationale that exposes corporations that sponsor employee benefit plans to massive and unforeseen liabilities, review by this Court is warranted.

Petitioner Curtiss-Wright Corporation maintained a plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, in order to provide healthcare benefits to retired employees. (Pet. at 4.) The lower court held that Curtiss-Wright had properly reserved its right to amend or terminate these benefits. (Pet. at 13a.) The court also concluded that Curtiss-Wright had actually amended its plan to eliminate benefits for retirees of a closed facility. (Pet. at 5a-6a.)

The lower court also held, however, that this plan amendment was unenforceable because Curtiss-Wright's plan failed to satisfy the requirement of ERISA § 402 (b)(3) that a plan "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan". (Pet. at 7a, 11a.) Thus, despite the conclusion that Curtiss-Wright had exercised its reserved power to amend, the amendment was invalidated, and Curtiss-Wright was held liable to pay over $2 million in benefits as provided under the pre-amendment plan. (Pet. at 6, 10a-11a.)

The decision below conflicts with decisions from other Courts of Appeals in several respects and should be reversed. Even assuming *arguendo* that the plan's governing document failed to provide an amendment procedure as required by ERISA § 402(b)(3), the remedy fashioned by the lower court in this case—invalidation of the amendment—is not one mandated or supported by ERISA's remedial scheme. Other circuits faced with similar circumstances have instead, consistent with established trust law principles, enforced amendments where it was clear, as here, that the plan's sponsor had both the power and intent to make the amendment.

Resolution of this circuit conflict is particularly important in these circumstances because the decision below

will engender uncertainty and litigation over the current validity of almost 20 years of post-ERISA plan amendments and expose plan sponsors to massive liabilities for benefits that they reasonably believed had been eliminated or modified by plan amendments now called into question by the decision. The plan provision authorizing amendments that was found inadequate by the court below is virtually identical to model language issued by the Internal Revenue Service and contained in numerous form books used by employee benefits practitioners. The conclusion of the court below that this commonplace formulation does not allow enforceable plan amendments presents an administrative nightmare for plan fiduciaries who must determine whether plan terms that resulted from amendments are valid and creates an open season for litigation challenging such amendments.

While the rationale of the decision below applies equally to all types of ERISA-covered plans, the litigation it is certain to engender unless reversed would have its greatest impact on welfare plans, including those that provide retiree medical benefits of the type at issue in this case. The efforts of American corporations in recent years to restrain their employee healthcare expenditures and especially to rein in their liabilities for retiree medical benefits have already led to a substantial amount of litigation. While adopting differing approaches to interpretation of plan documents, the circuit courts have uniformly held that welfare benefits—unlike pension benefits which are required by ERISA to vest according to a fixed schedule —do not vest but may be terminated or modified by a plan sponsor that has reserved its right to do so.

The decision below provides a roadmap to litigate around this non-vesting principle by making it impossible to have amended a plan to reduce benefits where there was not technical compliance with the lower court's interpretation of ERISA § 402(b)(3). While employers may be able to adapt to this rule on a prospective basis, they cannot fix the past. Even if a plan's amendment procedure

is immediately brought into conformance with the lower court's interpretation of ERISA § 402(b)(3) and a plan is immediately restated to ratify all past amendments, benefit claims arising from events prior to such restatement would be determined under the pre-restated plan. Thus, the enforceability of many existing plan terms is placed in doubt by the decision and can only be resolved through the litigation which, given that billions of dollars of benefits are potentially at stake, will inevitably ensue. The predictable result of exposing corporations to massive and unforeseen liabilities is that corporations will seek to offset these liabilities by reducing benefit costs in other ways, thus ultimately harming the plan participants whom ERISA was intended to protect. To resolve the questions presented by the petition and avoid this wasteful flood of litigation, review by this Court should be granted.

ARGUMENT

A. The Decision Below Creates Conflicts in the Circuits in Several Respects That Warrant Resolution by This Court

Curtiss-Wright promulgated an umbrella plan document, labeled the Constitution, which incorporated such "plan or plans" as Curtiss-Wright "might from time-to-time adopt." The Constitution provided that "the Company" (*i.e.*, Curtiss-Wright) reserved the right to terminate the plan "for any reason at any time" and "at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan". (Pet. at 4a.) Likewise, the Summary Plan Description issued in 1983, shortly before the challenged amendment in this case, also expressly preserved Curtiss-Wright's ability to modify or terminate the plan "at any time." (Pet. at 5a-6a.)

The Court of Appeals, while ruling that Curtiss-Wright had thus preserved its right to amend the plan's benefits, held that the amendment was unenforceable because the plan did not comply with ERISA § 402(b)(3) and thus

could not be validly amended. (Pet. at 11a.) The rationale for this conclusion was that reservation of the right to amend on the part of "the Company" did not provide adequate identification of either an amendment procedure or of the "persons who have authority to amend the plan." (Pet. at 7a-8a.)[1]

Assuming *arguendo* that Curtiss-Wright failed to comply with § 402(b)(3), the holding of the court below conflicts with holdings of other circuits. As a general principle, courts have insisted that plan participants' benefit entitlements be determined solely under the written terms of the plan.[2] In that way, all parties affected by the plan, employers as well as participants, will be able to rely on the written plan as the definitive statement of benefits.[3] But the decision below turns this principle on

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[1] The court's conclusion that Curtiss-Wright's reservation of an amendment right to "the Company" was legally insufficient is dubious on its face. Since § 3(9) of ERISA expressly defines the term "person" to include a "corporation" and other entities besides an "individual", Curtiss-Wright's designation of itself as, to use § 402(b)(3)'s phrasing, the "person" with "authority to amend the plan" was in compliance with § 402(b)(3). In a variety of other contexts, courts have recognized what § 3(9)'s language makes plain, *i.e.*, that a "person" need not be an "individual." *See, e.g., Confer v. Custom Eng'g Co.*, 952 F.2d 34, 36 (3rd Cir. 1991) (corporation is a "person" for purposes of ERISA under § 3(9)); *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 960 (1st Cir. 1989); *Scarbrough v. Perez*, 870 F.2d 1079, 1082 (6th Cir. 1989).

[2] *See, e.g., Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1295-97 (5th Cir. 1989); *Central States v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1149 (7th Cir. 1989); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

[3] The sole exception recognized by some courts is where a participant has reasonably relied to his or her detriment on some authoritative statement not contained in the written plan terms. *See, e.g., Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1158 (6th Cir. 1988) (affirmative misstatements made by corporate sponsor and relied upon by participants may entitle participants to those benefits).

its head. Although plaintiffs were not entitled to benefits under the terms of the written post-amendment plan and made no claim that they had ever been led to believe otherwise, the lower court nonetheless awarded them benefits.[4]

The decision of the court below to award a substantive remedy, *i.e.*, the pre-amendment benefits, for a violation of § 402(b)(3) also conflicts with decisions from several other circuits that a sponsor's or fiduciary's procedural violation of ERISA, absent a showing of bad faith, should not entitle a participant or beneficiary to an award of benefits not provided by a plan's terms.[5] Indeed, at least two other Courts of Appeals have resolved the remedy question presented by the petition directly contrary to the decision below. Thus, in *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990), and *Biggers v. Wittek Industries, Inc.*, 4 F.3d 291, 296 (4th Cir. 1993), the courts declined to award a substantive remedy for violations of § 402(b)(3) even where there was no reservation of amendment power

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[4] Indeed, the problems that the decision causes for plan administrators are aggravated by the court's attempt to limit its holding to amendments "advantageous to the sponsor's interest". (Pet. at 11a.) All plan amendments, even ones that increase benefits, are presumably "advantageous" to the sponsor, or the sponsor would not make the amendment. Moreover, it is typical for plan amendments both to simultaneously improve and restrict benefits and to affect different participants differently. For example, an amendment implementing a preferred provider network may provide greater benefits to participants who use network providers while lowering benefits to other participants.

[5] *See, e.g., Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743 (7th Cir. 1991) ("[a]n employer's procedural violations of ERISA entitle employees to monetary relief only in exceptional cases"); *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495, 1499 (11th Cir. 1987) ("ordinarily, violations of ERISA's procedural requirements do not entitle a claimant to substantive relief").

whatsoever. By holding that Curtiss-Wright could not enforce its amended plan, even though it had expressly reserved its amendment power in writing, the court below reached a result that is both ironic and obviously inconsistent with the results in *Adams* and *Biggers*.

The reason advanced by the court below for awarding a substantive remedy was that this was necessary to effectuate ERISA's goal of ensuring that participants know the details of the plan amendment process so that they may "determine with certainty at any given time exactly what the plan provides." (Pet. at 8a.) To the contrary, however, the way in which participants can determine what the plan provides is to look at the plan terms, or at the summary of those terms contained in the Summary Plan Description ("SPD"), which is the document required under § 102(b) of ERISA, 29 U.S.C. § 1022(b), to be distributed to participants. Notably, neither § 102 (b) nor the implementing agency regulations require that the SPD describe any of the details of the amendment process that were deemed so critical by the court below. *See* 29 C.F.R. § 2520.102-3. Thus, the policy rationale advanced by the court below for requiring a substantive remedy is actually inconsistent with, not in furtherance of, the express disclosure requirements of ERISA.

Moreover, as noted in *Biggers*, the result reached by the court below is contrary to principles of trust law. 4 F.3d at 291. This Court has frequently noted that ERISA's fiduciary duty provisions derive from trust law and has referred to trust law in interpreting those provisions (*see, e.g., NLRB v. Amax Coal Co., Div. of Amax, Inc.*, 453 U.S. 322, 332-34 (1981); *Central States v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985)), even as to plans not maintained in trust form. *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989). Section 331(1) of the Restatement

(Second) of Trusts (1959) provides that a "settlor has power to modify the trust if and to the extent that by the terms of the trust he reserved such a power." Comment c to § 331 is even more explicit as to the situation presented in this case and states:

> *Where no method of modification specified.* If the settlor reserves a power to modify the trust but does not specify any method of modification, the power may be exercised by any method which sufficiently manifests his intention to modify the trust.

It is difficult to envision a clearer manifestation of a plan sponsor's intent to amend a plan than Curtiss-Wright's promulgation and distribution of amended plan terms. Accordingly, under the trust law principles embodied in the Restatement, Curtiss-Wright's amendment should have been enforced. Because the decision below disregards these principles which have been properly applied by other circuits and also conflicts with decisions from other circuits in other respects, review by this Court should be granted.

B. The Decision Below Threatens Employers With Enormous and Unforeseen Liabilities and Thus Raises an Issue Warranting Review by This Court

The significance of the circuit split is accentuated in this case because the decision below is likely to lead to a flood of litigation, especially involving, although by no means limited to, health benefit provisions of welfare plans. By exposing employers to the enormous costs and potential liabilities of such litigation, the decision will ultimately lead these employers to restrain their benefit costs in other ways, to the detriment of plan participants.

Employee benefit plans under ERISA are categorized as pension plans or welfare plans. ERISA § 3(1),(2), 29 U.S.C. § 1002(1), (2). With limited exceptions, pension plans pay their benefits from trusts established to

qualify for the favorable tax treatment afforded by sections 401(a) and 501(a) of the Internal Revenue Code, 26 U.S.C. §§ 401(a), 501(a), and major plan amendments are routinely submitted to the Internal Revenue Service for advance determinations that the plan, as drafted, will qualify for this treatment. *Employee Benefits Law*, A.B.A. Sec. of Labor & Employment Law 462 (Steven J. Sacher, *et al.*, eds. 1991). Given the need for formality in drafting pension plan and trust documents and the routine practice of requesting governmental review, pension plan documents are typically drafted and reviewed by counsel or other benefits professionals and are thus more likely to comply with all of ERISA's formal requirements.

Even as to carefully drafted pension plans, however, there is good reason to doubt whether many plans have complied with the interpretation of § 402(b)(3) adopted by the court below. Prototype plan documents approved by the Internal Revenue Service for use by institutional designers of tax-qualified pension plans, such as banks and insurance companies, contain amendment language essentially identical to that found inadequate by the court below. *7 Pension and Profit Sharing 2d* (R.I.A. 1992) at 140,569. Likewise, model plan documents offered by major commercial services also offer language no more specific than that used by Curtiss-Wright. *See, e.g., Pens. Plan Guide* (CCH) (1989) at ¶ 30,070 (sample amendment provision of model defined benefit pension plan).

Although pension plans that incorporated any of these model provisions may now be vulnerable to suit as to past amendments, the problem is even more widespread for welfare plans. Benefits under the vast majority of welfare plans are not funded through trusts but are typically paid directly from corporate assets or insurance policies. Thus, welfare plans as a rule are much more casually and less formally documented than pension plans and are less likely to be drafted by benefits professionals. Moreover,

the terms of some welfare plans, such as health plans, typically change annually as companies negotiate new arrangements in an attempt to stretch their benefit dollars. Given the relative informality of welfare plan documentation and the frequency with which amendments occur in such plans, these plans are especially susceptible to suit under the rationale of the decision below.[6]

In recent years, the normal practice of frequent amendments to corporate welfare benefit plans has accelerated due to the national surge in healthcare costs.[7] A 1992 study by the General Accounting Office ("GAO") showed that health expenditures "have been the most rapidly growing component of employee compensation" and "escalated at more than twice the general inflation rate during the late 1980's". *See* Human Resources Div., U.S. General Accounting Office, *Employer-Based Health Insurance: High Costs, Wide Variation Threaten System* 4 (1992) ("1992 GAO Report"). In order to control their healthcare spending, employers have, according to the GAO, focused on "benefit plan design" as "the first factor a firm will alter to control rising costs." *Id.* at 10. Among the numerous design changes most frequently implemented by plan sponsors to control costs are the shifting of costs to employees through increased deductibles, copayments, and employees' share of premiums; cost-sharing incentives, including managed care arrangements that give financial incentives to participants to use net-

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[6] Indeed, the facts of this case reflect a sequence and documentation typical of corporate health plans. Curtiss-Wright successively contracted with different insurance carriers. Each insurance carrier provided somewhat different coverage, which resulted in a new SPD being issued to describe each plan change. (Pet. at 3a.)

[7] Although healthcare benefit plans are the most widespread type of welfare plan, other types of welfare benefits—including severance, disability, and life insurance—are also commonly provided by ERISA-covered plans. Plans providing these types of benefits also tend to be informally documented and to be amended frequently and are thus also heavily impacted by the decision below.

works of preferred providers; and cutbacks or elimination of coverage, including coverage for retired employees. *Id.* at 10-11.

These healthcare plan design changes can only be accomplished by plan amendments now called into question by the decision below. The enormous magnitude of the financial exposure to plan sponsors from the decision below can be seen by focusing on the type of change at issue in this case, cutbacks in retiree health benefits, which is only one of the numerous plan design changes identified by the 1992 GAO Report.

In a 1993 study, the GAO estimated the liability of American corporations to pay health benefits to retired former employees and their dependents at a staggering $412 billion. Human Resources Div., U.S. General Accounting Office, *Retiree Health Plans: Health Benefits Not Secure Under Employer-Based System* 2 (1993) ("1993 GAO Report"). Numerous private studies have estimated this liability to be much higher, even as high as $2 trillion. *See* Gregory Parker Rogers, *Rethinking Yard-Man: A Return to Fundamental Contract Principles in Retiree Benefits Litigation*, 37 Emory L.J. 1033, 1036 n.10 (1988) (collecting studies). Plan sponsors' recognition of the magnitude of these liabilities has been accentuated by the issuance of Financial Accounting Standard No. 106: Employers' Accounting for Postretirement Benefits Other Than Pensions (1990) ("FAS 106"), which, effective December 15, 1992, required companies that are subject to financial reporting requirements to recognize these liabilities on their balance sheets on an accrual basis, rather than the then-prevalent pay-as-you-go (cash) basis method.

Not surprisingly, then, companies' attempts to limit, modify, or terminate these benefit plans have occurred with increasing frequency. Five studies reviewed by GAO reported that from 42 percent to 93 percent of the employers surveyed had changed their retiree health benefit

plans over the past few years to contain costs or to decrease FAS 106 liability, and three of these studies reported that 33, 35, and 100 percent of the employers were considering future changes. The most frequent changes made by employers are to raise retiree premium contributions, deductibles and copayments, tighten eligibility requirements, eliminate certain covered services, and shift to managed care programs. *See* 1993 GAO Report at 3 & App. II.

Equally unsurprisingly, these corporate attempts to control or eliminate retiree healthcare costs have frequently resulted in litigation. The circuit courts, although differing somewhat in their interpretive approaches, have consistently held that these benefits—because they are welfare, not pension, benefits—do not vest as a matter of law but may be amended if the sponsor has reserved the amendment power.[8] Indeed, many of the decisions that have upheld amendments to such benefits have involved amendment clauses with wording very close to that used by Curtiss-Wright. *See, e.g., Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 933 (5th Cir.) ("Company reserves the right to alter, amend, delete, cancel or otherwise change the plan or any of the provisions of the plan at anytime [sic]"), *cert. denied*, 114 S. Ct. 196 (1993); *Musto v. American Gen. Corp.*, 861 F.2d 897, 903 (6th Cir. 1988) ("[I]nsurance coverage . . . may be amended or discontinued at any time"), *cert. denied*, 490 U.S. 1020 (1989); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 490, 492 n.1 (2d Cir. 1988) ("[t]he Company reserves the right at any time to change or discontinue this [plan]").

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[8] *See, e.g., McGann v. H & H Music Co.*, 946 F.2d 401, 405-07 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) ("ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued"), *cert. denied*, 481 U.S. 1016 (1987).

By holding that Curtiss-Wright's amendment language is inadequate to support an amendment of retiree benefits, the decision below provides an obvious litigation route for plaintiffs around the non-vesting principle established by the circuit courts in these retiree health cases and in numerous other cases involving other types of welfare benefit plans. In the short run, the liabilities arising from the decision, unless it is reversed, will fall on the corporations which sponsor these plans and which now find themselves liable under plan provisions they thought had been amended. The ultimate cost, however, would be borne by other plan beneficiaries as corporations eliminate or otherwise curtail other benefits to compensate for these increased liabilities.[9] As this Court has previously recognized, the costs of unanticipated liabilities under ERISA frequently fall "upon ERISA plans themselves" thus defeating the statutory goal of promoting and expanding plan coverage. *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2072 (1993), *citing Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981). To avoid this result and to protect plan sponsors from liabilities they could not have foreseen prior to the decision below, review should be granted.

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[9] This reduction of benefits by plan sponsors in response to increased plan cost is not theoretical but has been empirically observed. *See* 1992 GAO Report at 10. In an attempt to control overall health spending, plans have tended to first eliminate or limit family coverage, retiree coverage, or covered services and to limit coverage for specific conditions. *Id.* at 10-11.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and review the decision below.

Respectfully submitted,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1935

CURTISS-WRIGHT CORPORATION,
Petitioner,

v.

FRANK C. SCHOONEJONGEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file a brief *amicus curiae* in support of petitioner, Curtiss-Wright Corporation. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 220,000 businesses and professional organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government.

Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. For example, the Chamber has participated *amicus curiae* in the following ERISA cases recently decided in this Court: *District of Columbia v. The Greater Washington Board of Trade*, —— U.S. ——, 113 S. Ct. 580 (1992), *Patterson v. Shumate*, —— U.S. ——, 113 S. Ct. 13 (1992), *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990), *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), and *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988).

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA, both pension and welfare. The misguided decision below, which throws into doubt the terms of most employee benefit plans covered by ERISA, profoundly and adversely affects the Chamber's members, potentially subjecting them to retroactive liability in proportions difficult to imagine and the prospect of unnecessary, time-consuming and expensive litigation over the operation of their plans for the past 19 years.

We believe this Court's review is urgently needed. Without being overly dramatic, we wish to make the Court aware that, in terms of the number of plans affected and the magnitude of the impact—not just on employers but also on the federal judiciary—this case dwarfs any of the ERISA cases that this Court has previously chosen to decide.

Petitioner has consented to the Chamber's filing of a brief *amicus curiae* in this matter, and a copy of the consent letter is being filed simultaneously herewith. Respondent has not consented.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Does ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), require an employee benefit plan to identify specific individuals within the sponsoring organization who have authority to amend the plan, or otherwise require an amendment procedure more detailed than that contained in a plan that expressly reserves the sponsor's right to amend the plan?

2. Does a procedural noncompliance with ERISA causing no harm to plan participants—here, the Court of Appeals held that a plan's amendment provisions were insufficiently specific under ERISA § 402(b)(3)—give rise to a substantive remedy—here, striking an amendment from the plan document to invalidate a termination of nonvested welfare benefits?

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The interest of the Chamber as *amicus curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

The questions presented are exceptionally important because they affect most employee benefit plans under the Employee Retirement Income Security Act of 1974 ("ERISA"). The plan provision held by the decision below to be insufficient under ERISA is a standard provision conventionally included in most employee benefit

plans. If that provision really is insufficient under ERISA, most of the single-employer benefit plans in the United States—of which there are over 5 million—are affected.

The questions presented are also exceptionally important because of how seriously they affect employee benefit plans. The decision below invalidates the standard plan provision reserving to the employer the authority to amend the plan and voids all amendments previously adopted under that provision. As such, it voids all amendments to most employee benefit plans as far back as the statute of limitations reaches (potentially back to 1975), thus throwing into doubt the terms of all affected plans, not only today but for the past 19 years.

If not reversed, the decision below will mean untold harm to employers, employees and the federal judiciary. For example, repeated amendments have been required over the years to maintain qualified pension and profit sharing plans in compliance with the ever-changing rules of section 401(a) of the Internal Revenue Code. If those amendments are void, the plans are retroactively disqualified, causing employers to lose deductions for contributions, employees to incur income tax on their vested interests under the plan, and the pension trust to become a taxable entity which owes back taxes.

For another example, in the area of health care, employers have made repeated and significant amendments to their plans in recent years in order to contain costs, by introducing employee contributions, deductibles, co-pays, etc. For retirees, plan amendments have drastically reduced, or even eliminated, health coverage in response to recent accounting rule changes. If all of those amendments are void, massive class actions will be mounted to force the plans to re-pay all of those amounts to the participants—completely upsetting the trade-off between pay and benefits and frustrating the employer's attempt to control the cost of health care.

Worst of all, since a fiduciary has a federal statutory duty under ERISA not to enforce any term of the plan that contravenes ERISA, the plan administrator of every affected plan will be in doubt as to what the terms of the plan are (and have been since ERISA). Faced with personal liability for any misstep (on the ground of breach of fiduciary duty), every plan administrator's only intelligent course will be to seek instructions in federal court by means of a declaratory judgment action against the defendant class of participants, in which the court will review all amendments made to the plan over the past 19 years in order to decide what the terms of the plan have been at every point during that period. Congress could never have intended such an extravagant waste of private and judicial resources, which, in the ultimate irony, will only mean less money available for employee benefits.

ARGUMENT

THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT BECAUSE THE ANSWER GIVEN BELOW THROWS INTO DOUBT THE TERMS OF MILLIONS OF EMPLOYEE BENEFIT PLANS, VISITING ENORMOUS UNINTENDED COSTS ON EMPLOYERS AND BURDENING THE FEDERAL COURTS WITH A NEW CLASS OF ERISA LITIGATION.

A. The Questions Presented Affect Most Single-Employer Benefit Plans Covered by ERISA.

The questions presented affect most single-employer benefit plans covered by ERISA. The reason is that the language held invalid by the decision below is the conventional language used routinely by drafters of employee benefit plans. As a result, the overwhelming majority of plans contain language in substance identical to that held invalid by the decision below. Few contain language that assuredly survives that decision.

The conventional language originated long before ERISA. From the beginning of employee benefit plans,

good drafters have expressly reserved to the employer the right to amend the plan at any time. This has always been considered necessary under the common law of trusts, which holds that a trust generally cannot be amended unless such authority is expressly reserved in the trust instrument.[1] Under the common law of trusts, it was sufficient simply to recite, "The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan"—the very language at issue in this case. 4a.

Borrowing from the common law of trusts, ERISA established a statutory requirement that amendment be addressed in the plan document:

> Every employee benefit plan shall—
>
> . . .
>
> (3) provide a procedure for amending the plan, and for identifying the persons who have authority to amend the plan.

ERISA sec. 402(b), 29 U.S.C. § 1102(b).

Notably, ERISA did *not* require that the person with authority to amend be identified *in the plan*; it required no more than a "procedure . . . for identifying the persons who have authority to amend." Most practitioners concluded that the conventional reservation of authority to amend *exceeded* the statutory requirement—by actually identifying that person in the plan. They were confirmed in this view by the knowledge that (i) the intent of ERISA was to carry forward the common law of trusts

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[1] IV W. Fratcher, *Scott on Trusts* (1980) § 331 at 378-379; G. Bogert, *The Law of Trusts and Trustees* (2d ed. 1983), Ch. 47, § 992 at 218-219; *Restatement (Second) of Trusts* § 331. This flows from the unilateral nature of a trust and stands in contrast to the law of contracts, under which the parties can amend by mutual consent and need not reserve such authority in the original contract. 1A A. Corbin, *Corbin on Contracts* (1963) § 186; Restatement (Second) of Contracts (1979) § 89(a); Uniform Commercial Code § 2-209(1).

(as this Court has expressly confirmed on more than one occasion)[2], and (ii) the conventional language was entirely sufficient under the common law of trusts.

The text of ERISA itself provided the ultimate confirmation. By repeatedly imposing duties upon "the employer," with no references to officers or boards of directors or any other individual who might act on behalf of the employer, Congress conclusively demonstrated its intent that "the employer" was sufficient identification of the person with legal responsibility under ERISA.[3]

Thus was the conventional reservation of authority to amend perpetuated in practice after ERISA for most pension and welfare plans.[4] The petition contains an illustrative list of specimen benefit plans published in a wide variety of sources that contain the conventional language. The Chamber adds this affirmation from the experience of its members.

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[2] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, —— U.S. ——, 113 S. Ct. 2264, 2276 (1993) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-332 (1981)); *Mertens v. Hewitt Associates*, —— U.S. ——, 113 S. Ct. 2063, 2068, 124 L.Ed.2d 161, 170 (1993); *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985); *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

[3] One obvious virtue of saying "the employer" is that it automatically accommodates employers of every different type—sole proprietorships, partnerships, and corporations, for example. How each of these acts is a matter of the law of the state with authority over their activities. Trying to spell out in an employee benefit plan exactly how the sponsoring entity acts runs a risk of conflicting with state law and generating unnecessary and unwelcome questions of ERISA pre-emption.

[4] The same is true of multiemployer plans, but the conventional language in multiemployer plans was always somewhat more detailed, consistent with their governance by a joint board of trustees —half appointed by the unions and half appointed by the employers. The decision below recites that it does not disturb the conventional language in multiemployer plans.

The universe of single-employer pension and welfare plans covered by ERISA is large indeed. It comprises both pension plans (pension, profit sharing, 401(k), ESOP, etc.) and welfare plans (medical, life insurance, disability, severance, etc.). According to a recent tabulation by the U. S. Department of Labor, there were 873,000 single-employer pension plans covered by ERISA in 1987. In addition, in 1987, there were an estimated 4,500,000 welfare plans covered by ERISA.[5]

Until the decision below, no employer or drafter had any reason to doubt the sufficiency of the conventional language, which had survived almost 20 years of ERISA litigation, not only without being invalidated, but without even being *challenged*, as far as we can determine. For example, reduction or elimination of retiree medical insurance has been one of the most hotly contested areas of recent years. In almost every case where the amendment language is reported, it is in substance identical to the amendment language in this case, but not once has the sufficiency of that language even been challenged.[6]

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[5] M. Brossman and K. Kamen, *Employee Benefit Issues 1993* at 386 (International Foundation of Employee Benefit Plans, 1993). Figures for pension plans come from the annual reports that plans are required to file with the Department of Labor. Since many small welfare plans are exempt from filing the annual report, the figure for welfare plans is an estimate by the Department of Labor.

[6] *See, e.g., Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133 (6th Cir. 1993); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.), *cert. denied*, —— U.S. ——, 114 S. Ct. 196 (1993); *Boyer v. Douglas Components Corp.*, 986 F.2d 999 (6th Cir. 1993); *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698 (11th Cir. 1993); *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992); *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 2992 (1993); *United Paperworkers Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384 (8th Cir. 1992); *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989);

B. The Decision Below Throws Into Doubt the Terms of All Affected Plans.

Very simply, the decision below holds that the conventional language, reserving the authority to amend the plan to the employer, is insufficient as a matter of law under ERISA; as a result, according to the decision below, amendments adopted thereunder are void. Thus, the practical effect of an affirmative answer to the questions presented is to *void all amendments to most single-employer benefit plans since the enactment of ERISA*. This is a classic example of the cure being worse than the disease.

Employee benefit plans undergo regular and, in many cases, constant change. These changes are effected by plan amendment. They serve a variety of purposes, such as (i) updating the plan to comply with changes in the law and regulations, (ii) re-arranging benefits to better meet the needs of employees, (iii) improving or reducing benefits in accordance with the employer's ability to pay, and (iv) conforming the plan to changes in the employer's situation, including acquisitions and divestitures. Aside from a relative handful of brand new plans, it is doubtful that there is any single-employer benefit plan covered by ERISA—whether pension or welfare—that has not been amended repeatedly since ERISA.

Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *In re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986); *Sprague v. General Motors Corp.*, 843 F. Supp. 266 (E.D. Mich. 1994); *In re Unisys Corp. Retiree Benefits Litigation*, 837 F. Supp. 670 (E.D. Pa. 1993); *United Steelworkers v. Newman-Crosby Steel, Inc.*, 822 F. Supp. 862 (D.R.I. 1993); *Benedict v. United Inter-Mountain Telephone Co.*, 820 F. Supp. 354 (E.D. Tenn. 1993); *Joyce v. Curtiss-Wright Corp.*, 810 F. Supp. 67 (W.D. N.Y. 1992); *Chervin v. Sulzer Bingham Pumps, Inc.*, 13 EBC 1089 (D. Or. 1990); *Box v. Coalite, Inc.*, 643 F. Supp. 709 (N.D. Ala. 1986).

For example, in the 19 years since enactment of ERISA in 1974, Congress has changed the law applicable to pension and profit sharing plans that are intended to qualify under section 401(a) of the Internal Revenue Code at least a dozen times, not to mention constant changes in regulations.[7] In response, employers have regularly exercised their authority to amend, under the conventional reservation language of their plans, to keep the plans in compliance with section 401(a). If those amendments are void, virtually every qualified pension and profit sharing plan has been disqualified.

For another example, the vast majority of medical plans for active employees have been amended in recent years in order to implement cost containment features, such as employee contributions, deductibles, co-pays, preferred provider organizations, etc.[8] It is generally understood that such amendments have been instrumental in holding down the cost of medical plans (at least by slowing the rate of increase in cost) and, therefore, keeping

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[7] *See, e.g.*, Omnibus Budget Reconciliation Act of 1993, P. L. 103-66; Unemployment Compensation Amendments of 1992, P. L. 102-318; Omnibus Budget Reconciliation Act of 1989, P. L. 101-239; Technical and Miscellaneous Revenue Act of 1988, P. L. 100-647; Omnibus Budget Reconciliation Act of 1987, P. L. 100-203; Tax Reform Act of 1986, P. L. 99-514; Retirement Equity Act of 1984, P. L. 98-397; Tax Reform Act of 1984, P. L. 98-369; Tax Equity and Fiscal Responsibility Act of 1982, P. L. 97-248; Economic Recovery Tax Act of 1981, P. L. 97-34; Miscellaneous Revenue Act of 1980, P. L. 96-605; Revenue Act of 1978, P. L. 95-600; Tax Reform Act of 1976, P. L. 94-455.

[8] Between 1979 and 1991, the percentage of participants who were required to contribute toward the cost of health care for themselves under ERISA-covered plans nearly doubled—to 51%—and the amount of the employee contribution was raised by 2½ times. Likewise, in 1980, only 3% of participants in medium and large establishments were enrolled in managed care programs; in 1991, 33% were enrolled in managed care programs. Just from 1986 to 1991, the percentage of participants subject to hospital pre-admission certification rose from 16% to 63%. U.S. Department of Labor, *Monthly Labor Review* at 9 (March 1994).

medical plans affordable for employers and employees alike. Under the decision below, however, all of those amendments are void.

There have also been major amendments to medical plans for retirees. According to a recent survey, two thirds of companies made changes in their retiree medical plans in 1991 or 1992, principally because of Statement of Financial Accounting Standards No. 106, adopted in December 1990. Approximately one third of employers surveyed amended their plans to increase the retiree contribution toward medical coverage. Sixteen percent increased deductibles or out-of-pocket maximums. Ten percent changed eligibility standards.[9] Under the decision below, however, those amendments are void.

The impact of the questions presented would not be so broad and serious if the decision below were limited to prospective effect, but it applies retroactively as well. The extent of the retroactive effect depends on the statute of limitations. At a minimum, the decision below voids amendments adopted within the period of the most analogous state statute of limitations, likely a period of at least several years. Employees will undoubtedly argue, however, that the decision below voids all amendments adopted since the effective date of ERISA section 402(b)—January 1, 1975 [10]—on the theory that the plan administrator has a fiduciary duty to apply the terms of the plan as they exist under law, without regard to any invalid amendments, no matter when they occurred.[11]

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[9] *Retiree Medical Benefits: Who Are the 1992 Wyatt COMPARE Employers?*, reported at 20 *Pension & Benefits Reporter* (BNA) 1079-1080 (May 17, 1993).

[10] ERISA sec. 414(a), 29 U.S.C. § 1114(a).

[11] This principle is analogous to the principle of the common law of trusts that a fiduciary generally may not invoke the statute of limitations against a beneficiary. 1 C. Corman, *Limitations on*

The fiduciary duty of the plan administrator adds a dimension that the decision below did not take into account. There is no doubt that the plan administrator under ERISA exercises fiduciary responsibility in interpreting and applying the plan. 29 C.F.R. § 2509.75-8.[12] Under ERISA, as a fiduciary, the plan administrator is bound to adhere to the terms of the plan *but only insofar as those terms are consistent with ERISA*:

> [A] fiduciary shall discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or Title IV.

ERISA sec. 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).[13]

The decision below holds, as a matter of law under ERISA, that plan amendments adopted pursuant to the conventional reservation of authority to amend are *not* consistent with ERISA. ERISA section 404(a)(1)(D) therefore forbids the plan administrator to give them effect.[14] If the decision below stands, therefore, the plan

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Actions (1991) § 9.10; *Restatement (Second) of Trusts* § 219, comments a, c; 2 H. Wood, *Limitation of Actions* (4th Ed. 1916) § 200.

[12] The individual, committee or other entity with authority to interpret and apply the terms of the plan to grant or deny claims for benefits may have a variety of different titles in different plans—"claims administrator," "benefits committee," "trustee," "named fiduciary," etc. In this brief, we adopt the terminology of the cited regulation of the Department of Labor and refer to that fiduciary generically as the "plan administrator."

[13] "This title" refers to Title I of ERISA, including section 402(b)(3) which is at issue in this case.

[14] The decision below expresses the hope that it can be limited to only those amendments which are challenged by participants, presumably only those which adversely affect participants. 11a, n. 5. That hope is vain; as a fiduciary under ERISA, the plan

administrator of each affected plan has a fiduciary duty to reconstruct the terms of the plan ignoring all such amendments. As a rseult, the decision below throws into doubt the terms of most single-employer benefit plans covered by ERISA, both pension and welfare.

C. The Decision Below Contradicts the Purpose of ERISA by Imposing Upon Employers Significant Costs Not Intended by Congress and Will Burden the Federal Courts With a New, Entirely Unnecessary Class of ERISA Litigation.

Calling into question, and perhaps voiding, virtually all amendments adopted since ERISA will have a variety of serious, adverse consequences wholly unintended by Congress in ERISA and will work directly contrary to the intent of Congress in ERISA to promote and encourage employee benefit plans. It will also create a new class of ERISA litigation in the federal courts, with the lawsuits brought by the fiduciaries if not by the participants.

1. Disqualification of a pension or profit sharing plan under section 401(a) of the Internal Revenue Code means that (i) the employer loses the deductions that it took under section 404 of the Internal Revenue Code for contributions to the plan, (ii) the employees must pay federal income tax on the value of their vested interests in the plan (though they receive no money with which to pay the taxes), (iii) the trust becomes a taxable entity and owes federal income tax on its earnings, and (iv) distributions from the plan to employees do not qualify for special tax treatment such as rollover to an individual

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administrator has a spontaneous, federal statutory duty to determine what the terms of the plan are and then to carry them out, regardless of whether anyone has challenged them. As a fiduciary, the plan administrator simply is not permitted to give effect to plan terms that are unlawful under ERISA.

retirement account. The effect on employers and employees alike can be devastating.[15]

2. Where plan amendments have reduced benefits, employees can be expected to sue to recoup the amount of the reduction. To take one common example, suppose that an employer recently amended its medical plan to convert from a so-called "first dollar" plan (where all medical expenses are covered in full) to a so-called "comprehensive" plan (where the employee must pay a deductible before any expenses are covered and then must make a "co-pay" until the "out-of-pocket maximum" is reached). According to the decision below, if the plan's amendment provision was the conventional reservation of authority, all employees would be entitled to recoup from the plan the deductibles and co-pays that they paid after the amendment.

Where benefits have been eliminated, employees can be expected to sue to recover the full benefits. This case is the perfect example: the employer amended the plan to eliminate medical coverage for retirees but the retirees won

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[15] Due to the vigorous and unforgiving enforcement posture of the Internal Revenue Service, disqualification is an immediate, not remote, possibility. Over the past few years, the Internal Revenue Service has been aggressively seeking out plans that have not been amended to comply with recent changes in the law and disqualifying them unless the sponsor agrees to pay very substantial penalties, in some cases ranging into the tens of millions of dollars. Administrative Policy Regarding Sanctions, announced March 26, 1991, Internal Revenue Manual 7(10)54; Employee Plans Closing Agreement Pilot Program ("CAP"), announced December 21, 1990, established as a permanent program on October 9, 1991, Internal Revenue Manual (11)10-80; Voluntary Compliance Resolution Program ("VCR"), Rev. Proc. 92-89, 1992-46 I.R.B. 27, October 28, 1992, extended by Rev. Proc. 93-36, 1993-29 I.R.B. 73. See also Rev. Proc. 94-16, 1994-5 I.R.B. 22 (Jan. 12, 1994).

As of March 31, 1994, the IRS had closed 820 cases under CAP involving 330,000 participants; about 170 cases are still pending. IRS has received 650 cases under VCR and 100 under "Standardized VCR" ("SVP") as of April 30, 1994. 21 *Pension & Benefits Reporter* (BNA) at 1091.

full payment of the benefits nonetheless. As noted above, elimination (or reduction) of medical benefits for retirees has been widespread in recent years, accelerating after the promulgation of FAS 106 in December 1990. Yet victory for retirees is virtually automatic under the decision below, thus retroactively denying employers all of the savings that they believed to have been achieved.

3. Ironically, plan amendments are just as likely to have *improved* the benefits of the plan, but plan administrators, as fiduciaries under ERISA, will be required to roll back the terms of the plan to where they stood before any post-ERISA amendments. As a result, it will be clear that many participants have been paid far more than they were entitled to, under the terms of the plan as now understood in retrospect.

Yet, for obvious reasons, plan administrators will find it impossible, as a practical matter, to recoup these overpayments of benefits. Any attempt to do so will produce lengthy litigation in federal court, likely involving fact-intensive questions of estoppel, for example.[16] In the end, employers likely will be required to absorb these additional costs, resulting in a "heads-I-win, tails-you-lose" double whammy for employers, already reeling under the escalating cost of health care.

4. Perhaps worst of all, however, the decision below will effectively require the plan administrators of virtually all affected plans to seek instructions in federal court as to what the terms of the plan are. As shown above, the plan administrator has a federal statutory duty to carry out the terms of the plan, but only insofar as those terms are consistent with ERISA. After the decision below, no plan administrator can be certain what those terms are (or have been since 1975).

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[16] Jurisdiction of such actions will lie exclusively in federal court under ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1).

This is not an area where the plan administrator can act reasonably and invoke the "arbitrary or capricious" standard of review. The validity of a plan amendment provision under ERISA section 402(b) is a question of law as to which the plan administrator receives no deference.

As a result, the plan administrator acts in peril of personal liability for any error in applying the decision below to the history of the plan since 1975. Under ERISA, fiduciary liability is personal, not a liability of the plan. And ERISA section 502(1), 29 U.S.C. § 1132(1), imposes an additional 20% penalty upon the fiduciary personally (unless waived or reduced by the Secretary of Labor).

In the climate of uncertainty created by the decision below, and faced with enormous personal liability, the only prudent course for plan administrators, as fiduciaries under ERISA, will be to apply to a federal district court for instructions as to what the terms of the plan are (and have been since 1975). This Court has expressly recognized the right of a fiduciary under ERISA to apply to a federal court for instructions. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989) ("A trustee who is in doubt as to the interpretation of the instruction can protect himself by obtaining instructions from the court.")

Needless to say, enmeshing the federal courts in deciding what the terms of most single-employer pension and welfare benefit plans have been over the past 19 years represents a cost to the private sector and a burden to the judiciary that cannot possibly have been intended by Congress in ERISA and will only feed the growing attitude of employers that the legal regulation of employee benefit plans has made them too risky and too expensive.

Given the interstate reach of many employee benefit plans and the liberal venue and universal service of process provisions of ERISA, the problem cannot be contained in

the Third Circuit. While the decision below conflicts with decisions of the Fourth and Sixth Circuits (and probably the Seventh Circuit), as pointed out in the petition, many employee benefit plans cover participants in more than one circuit. All it takes, therefore, is one participant in the Third Circuit to institute a class action on behalf of all participants nationwide.[17] Plans all across the United States will be exposed to egregious forum-shopping if clever class-action counsel can identify even one employee or retiree residing in Pennsylvania, New Jersey, Delaware or the Virgin Islands—not a difficult task with respect to most companies of national stature.

In order to protect themselves against such forum-shopping, the administrators of such plans will be forced to launch pre-emptive strikes in one of the circuits that disagree with the Third. These pre-emptive strikes will take the form of an action for declaratory judgment by the plan administrator against the participants as a defendant class, seeking to settle the terms of the plan as including all amendments made pursuant to the conventional reservation of authority to amend. Such a wasteful, burdensome exercise cannot have been within the contemplation of the Congress that enacted ERISA.[18]

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[17] ERISA effectively permits an action to be brought in any district where the participant resides, on the ground the breach occurred there; this is all the more true for retirees, who may retire to any circuit regardless of where their former employer conducted business. ERISA sec. 502(e)(2), 29 U.S.C. § 1132(e)(2).

[18] Even if the employer is headquartered in the Third Circuit, the intelligent course for the plan administrator would be to find a participant residing in one of the circuits that disagree with the Third and file in that circuit for declaratory judgment against all participants as a class.

CONCLUSION

In ERISA, Congress sought and achieved a balance between the rights of employees and the burdens on employers, recognizing that misguided regulation could easily go overboard and, ironically, lead to the elimination of employee benefit plans. *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990). This Court has repeatedly upheld the balance that Congress achieved in ERISA against those who would upset it by imposing additional burdens on employers, and the time has come to do so again—in a case with implications even more far-reaching and devastating than any previous ERISA decision of this Court.

Respectfully submitted,

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No. 93-1935

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JUNE 1, 1994
CERTIORARI GRANTED SEPTEMBER 26, 1994

BEST AVAILABLE COPY

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RELEVANT DOCKET SHEET ENTRIES

United States District Court for the District of New Jersey

	DESCRIPTION	DATE
1.	Complaint filed by Frank C. Schoonejongen; Wesley L. Losson; John S. Dunning; William Martone; William V. Hanzalek; Edward F. Ziek; Melvin Deblock; Joseph Colquhoun; Joseph Majerscak; Gerard Abbamont; Olga Wolsey	October 31, 1984
2.	Answer filed by Curtiss-Wright Corporation Filed:	January 7, 1985
3.	Order Dismissing Count II of Complaint Entered:	April 8, 1985
4.	Answer to First Amended Complaint Filed:	August 29, 1985
5.	First Amended Complaint Filed:	January 29, 1986
6.	Order granting in part motion of defendant for summary judgment as to Count I and denying all other aspects of plaintiffs' and defendant's cross-motions for partial summary judgment Entered:	April 15, 1986
7.	Transcript of the proceedings of the summary judgment motion Filed:	April 23, 1986

	DESCRIPTION	DATE
8.	Order dismissing plaintiffs' claims for damages for mental distress and anguish Entered:	June 24, 1986
9.	Opinion of the District Court for the District of New Jersey granting plaintiffs' motion to divide plaintiffs' class into subclasses and granting in part and denying in part plaintiffs' motion for summary judgment and denying cross-motions for summary judgment on the factual common law breach of contract claim in Counts I and II Entered:	August 15, 1988
10.	Hearing on defendant's motion to dismiss promissory estoppel claims in Count II; hearing on defendant's motion to dismiss any claims for employee benefits based upon an ERISA violation of nondisclosure of benefits Held:	September 19, 1990
11.	Order dismissing plaintiffs' cause of action for promissory estoppel and dismissing plaintiffs' cause of action for violations of reporting disclosure and requirements of ERISA Entered:	September 24, 1990
12.	Trial without a jury Held:	September 25, 1990

	DESCRIPTION	DATE
13.	Trial without a jury continued; portion of deposition transcripts of David Morrison, Frank Saunders, Elmer Van Broekhoven & Wesley Losson offered into evidence; hearing on defendant's application to dismiss Complaint under Rule 41(b) and dismiss claims of certain subclasses Held:	September 26, 1990
14.	Trial without a jury continued; Ordered defendant's application for order, heard on September 26, 1990, denied Entered:	September 28, 1990
15.	Trial without a jury continued Held:	October 1, 1990
16.	Transcript of proceedings of September 28, 1990 Filed:	October 1, 1990
17.	Trial without a jury continued Held:	October 2, 1990
18.	Trial without a jury continued Held:	October 3, 1990
19.	Trial without a jury continued. Judgment of the United States Court for the District of New Jersey for plaintiffs. Opinion stated into record Entered:	October 4, 1990
20.	Page and line numbers of various depositions Filed:	October 5, 1990

	DESCRIPTION	DATE
21.	Opinion of the United States District Court for the District of New Jersey Entered:	December 18, 1990

United States Court of Appeals for the Third Circuit

	DESCRIPTION	DATE
1.	Notice of Appeal by Curtiss-Wright Corporation filed in the United States Court of Appeals for the Third Circuit Filed:	December 9, 1992
2.	Opinion of the Court of Appeals for the Third Circuit Entered:	December 28, 1993
3.	Petition by Curtiss-Wright Corporation for Rehearing and Suggestion for Rehearing in Banc Filed:	January 11, 1994
4.	Opinion of the Court of Appeals for the Third Circuit vacating its December 28, 1993 Opinion Entered:	March 3, 1994
5.	Judgment of the United States Court of Appeals for the Third Circuit Entered:	March 3, 1994
6.	Order of the Court of Appeals for the Third Circuit on Petition for Rehearing Entered:	March 3, 1994

	DESCRIPTION	DATE
7.	Order of the Court of Appeals for the Third Circuit denying Petition for Rehearing in Banc Entered:	March 14, 1994

Supreme Court of the United States

	DESCRIPTION	DATE
1.	Petition for Writ of Certiorari Filed:	June 1, 1994
2.	Order allowing Certiorari Entered:	September 26, 1994

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY

FRANK C. SCHOONEJONGEN; WESLEY L. LOSSON; JOHN S. DUNNING; WILLIAM MARTONE; WILLIAM V. HANZALEK; EDWARD F. ZIEK; MELVIN DEBLOCK; JOSEPH COLQUHOUN; JOSEPH MAJERSCAK; GERARD ABBAMONT; and OLGA WOLSEY, on behalf of themselves and all others similarly situated,

Plaintiffs,

—vs—

CURTISS-WRIGHT CORPORATION,

Defendant.

FIRST AMENDED COMPLAINT
[Filed August 14, 1985]

Plaintiffs, for themselves and all other members of the class hereinafter defined, by and through their undersigned attorneys, complain of Defendant as follows:

Nature of Action, Jurisdiction, Parties and Venue

1. This action is brought by Plaintiffs in their individual capacities and as a class action pursuant to Rule 23(a) and (b) of the Federal Rules of Civil Procedure.

2. Count I is brought under Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974, as

amended (ERISA), 29 U.S.C. § 1132(a)(1)(B), and seeks to recover benefits due and to clarify rights to future benefits. The Court has jurisdiction over Count I under 502(a)(1)(B) and (e)(1) of ERISA, 29 U.S.C. § 1132(a)(1)(B) and (e)(1).

3. Count II is brought as a contract action under federal common law and seeks declaratory and injuctive [sic] relief and damages for Defendant's breach of an agreement to provide certain benefits to Plaintiffs and to the class of individuals which Plaintiffs represent. This Court has jurisdiction over Count II under 28 U.S.C. § 1331.

4. Defendant Curtiss-Wright Corporation (the "Company") was, and is, at all relevant time, a Delaware corporation headquartered at One Passaic Street, Wood-Ridge, New Jersey 07075.

5. Defendant Company was and is qualified to do business in the State of New Jersey and operated a production facility at Wood-Ridge, New Jersey until on or about November 30, 1983.

6. Plaintiff Frank C. Schoonejongen is a former employee of Curtiss-Wright Corporation who was employed at its Wood-Ridge facility as Supervisor of Plant Engineering. He retired in September 1976 after more than thirty-six years of service with the Company. He received certain post-retirement health benefits until Defendant cut off those benefits on December 1, 1983.

7. Plaintiff Wesley L. Losson is a former employee of Curtiss-Wright Corporation who was employed at its Wood-Ridge facility as Manager of Manufacturing and Technical Assistant License Agreements. He retired in October 1964 after thirty-six years of service with the Company. He received certain post-retirement health benefits until Defendant cut off those benefits on December 1, 1983.

8. Plaintiff John S. Dunning is a former employee of Curtiss-Wright Corporation who was employed at its Wood-Ridge

facility as Supervisor in Production Manufacturing. He retired in November 1976 after thirty-nine years of service with the Company. He received certain post-retirement health benefits until Defendant cut off those benefits on December 1, 1983.

9. Plaintiff Olga Wolsey is a former employee of Curtiss-Wright Corporation who was employed at its Wood-Ridge facility as Senior Personnel Clerk. She retired in January 1981 after a [sic] twenty-four years of service with the Company.

10. Plaintiff William Martone is a former employee of Curtiss-Wright Corporation who was employed at its Wood-Ridge facility as a Supervisor of Production Planning and in Inventory Control. He retired in December 1982 after thirty-eight years of service with the Company. He received certain post-retirement health benefits until those benefits were cut off by Defendant on December 1, 1983.

11. Plaintiff William V. Hanzalek is a former employee of Curtiss-Wright Corporation was who [sic] employed at its Wood-Ridge facility as Manager of Marketing Services. He retired in March 1983 after over forty years of service with the Company. He received certain post-retirement health benefits until those benefits were cut off by Defendant on December 1, 1983.

12. Plaintiff Gerard Abbamont is a former employee of Curtiss-Wright Corporation who was employed at its Ridge-Wood facility as Manager of Experimental Testing and Assembly. He retired in December 1982 after forty years of service with the Company. He received certain post-retirement health benefits until those benefits were cut off by Defendant on December 1, 1983.

13. Plaintiff Joseph Colquhoun is a former employee of Curtiss-Wright Corporation who was employed at its Wood-Ridge facility as a Buyer-Specialist. He retired in November 1983 after thirty-two years of service with the Company. Defendant refused to provide him with any post-retirement health benefits.

14. Plaintiff Edward F. Ziek is a former employee of Curtiss-Wright Corporation who was employed at its Wood-Ridge facility as Facility Engineer in Plant Engineering. He retired in January 1984 after twenty-eight years of service with the Company. Defendant refused to provide him with any post-retirement health benefits.

15. Plaintiff Melvin DeBlock is a former employee of Curtiss-Wright Corporation who was employed at its Wood-Ridge facility as Supervisor and Senior Engineer. He retired in May 1984 after forty-two years of service with the Company. Defendant refused to provide him with any post-retirement health benefits.

16. Venue in this judicial district is proper under 29 U.S.C. § 1391 and 29 U.S.C. § 1132(e)(2).

17. A copy of this Complaint has been served upon the Secretary of Labor and Secretary of the Treasury as required by Section 502(b) of ERISA, 29 U.S.C. § 1132(b).

FACTUAL BACKGROUND

18. In or about 1966, Defendant Curtiss-Wright Corporation instituted a post-retirement health benefits program which provided medical and surgical benefits to its retirees and their eligible dependents. Defendant Company bore the full cost of this program and extended it to those employees who had retired prior to the institution of the program.

19. Defendant Curtiss-Wright Corporation distributed booklets and other material describing the post-retirement health benefits program to its employees at various times during the years following the institution of the program.

20. Representatives of Defendant Curtiss-Wright Corporation met with employees at the time of such employees' retirement and described the post-retirement health benefits which they would receive. Such representatives never

informed the retirees that their coverage was terminable under any circumstances or conditional in any way.

21. Representatives of Defendant Curtiss-Wright Corporation also reassured retired employees at various times that these post-retirement health benefits would continue indefinitely following of [sic] such employees' retirement.

22. On or about September 28, 1983, Defendant Curtiss-Wright Corporation announced that it was phasing out all production operations at the Wood-Ridge facility where Plaintiffs worked or had worked. It was announced that all operations at that facility would cease by November 30, 1983.

23. In a letter dated November 4, 1983 to all retired Wood-Ridge non-bargaining unit employees, Defendant Curtiss-Wright Corporation announced that it was terminating all post-retirement health benefits effective December 1, 1983.

24. Each of the named Plaintiffs received his or her salary, promotions and benefits from the corporate offices of Curtiss-Wright Corporation, rather than from the Wood-Ridge facility itself.

CLASS ACTION ALLEGATIONS

25. Plaintiffs bring this action individually and on behalf of others similarly situated to recover the health benefits due them and to clarify their rights to such benefits in the future.

26. The class represented by Plaintiffs is defined as follows: all those retired Wood-Ridge employees of Defendant Company who were not members of the bargaining unit represented by the United Auto Workers at the time of their retirement and whose post-retirement health benefits were terminated or denied on or about December 1, 1983.

27. The class of Plaintiffs is so numerous as to make it impracticable to bring all the members of the class before the Court. The exact number of individuals comprising the class

is unknown to Plaintiffs but may be determined from records maintained by Defendant. Such records will also disclose the names and addresses of the class members.

28. Common questions of law and fact affect the rights of each member of Plaintiffs [sic] class and a common type of relief is sought for that class.

29. Plaintiffs' claims are typical of the claims of the class defined above in that each individual Plaintiff was a non-bargaining unit employee of Defendant Company at its Wood-Ridge facility, each has retired and is receiving pension benefits and each has been denied post-retirement health benefits for the period subsequent to December 1, 1983.

30. Plaintiffs will fairly and adequately represent the interests of the class. No Plaintiff has an interest adverse to the interests of the class, and counsel retained by Plaintiffs and the class are experienced in class actions and otherwise thoroughly competent.

31. Prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to individual members.

32. The class action is superior to other available methods for the fair and efficient adjudication of this controversy.

CLAIMS FOR RELIEF

COUNT I

33. Plaintiffs reallege and incorporate by reference paragraph I through 32 above as though fully set forth herein.

34. Defendant Curtiss-Wright Corporation is an employer within the meaning of ERISA, 29 U.S.C. § 2201(5).

35. The post-retirement health program established and maintained by Curtiss-Wright Corporation for the purpose of

providing certain medical, surgical, hospital and other health benefits for retired employees and their eligible dependents is an "employee benefit plan" within the meaning of ERISA, 29 U.S.C. § 1102(3).

36. Upon information and belief, Curtiss-Wright Corporation is the "plan sponsor" and "administrator" of that employee benefit plan and therefore a "plan fiduciary" within the meaning of ERISA, 29 U.S.C. § 1002(16) and (21).

37. The individual Plaintiffs and the members of the class are "participants" of that employee benefit plan within the meaning of ERISA, 29 U.S.C. § 1002(7).

38. Under the terms of this employee benefit plan, Defendant Curtiss-Wright Corporation promised to provide certain retired employees and their eligible dependents with specified medical benefits for the duration of those retirees' lives.

39. Notwithstanding the cessation of production operations by Defendant Curtiss-Wright Corporation at its Wood-Ridge facility, persons who have retired from active employment with Defendant Curtiss-Wright Corporation and their eligible dependents continue to be entitled to receive the health benefits promised under the employee benefit plan for the duration of the retirees' lives, since they have fully performed the services and satisfied all of the conditions required to entitle them to lifetime vested benefits under that employee benefit plan.

40. By terminating health benefits under the employee benefit plan for Plaintiffs and the members of the class and by refusing to provide such benefits in accordance with the terms of that plan and with its representations to those retirees, Defendant Curtiss-Wright Corporation has violated its fiduciary duty by arbitrarily and capriciously refusing to apply the terms of that employee benefit plan.

COUNT II

41. Plaintiffs reallege and incorporate by reference paragraphs 1 through 40 above as though fully set forth herein.

42. Defendant Curtiss-Wright Corporation and its representatives and agents assured Plaintiffs and the other class members that it had established and planned to continue a post-retirement health program which was to provide certain health benefits to each retiree and his or her eligible dependents for the duration of each retiree's life. Such representations were repeatedly made to Plaintiffs and the other class members while actively employed and at the time of and subsequent to the dates of their respective retirements.

43. These representations by Defendant concerning a post-retirement health program were part of a package of employee benefits that induced Plaintiffs and the other class members to continue in the employ of the Defendant Curtiss-Wright Corporation rather than to seek or accept other employment opportunities.

44. Plaintiffs and other class members relied on these representations to their detriment.

45. Defendant Curtiss-Wright Corporation contractually obligated itself to provide the promised medical benefits to Plaintiffs and the other class members, as well as their eligible dependents, for the duration of the lives of the retirees.

46. Defendant Curtiss-Wright Corporation has breached that contract. Plaintiffs and the other class members have been injured by that breach.

WHEREFORE, Plaintiffs and the class which they represent respectfully pray that this Court grant the following relief with respect to both Count I and Count II:

A. A determination that this action shall proceed as a class action in behalf of the class of Plaintiffs hereinabove described.

B. A declaratory judgment that retired employees of Defendant Company and their eligible dependents are entitled to the post-retirement health benefits promised under the employee benefit plan described in Count I and in the contract described in Count II for the duration of the retirees' lives, and that Curtiss-Wright Corporation is obligated to provide said retirees and their eligible dependents with such medical benefits for the duration of their lives.

C. Injunctive and mandatory relief requiring Defendant Curtiss-Wright Corporation to provide such post-retirement medical benefits to Plaintiffs and the other members of the class for the duration of their lives.

D. Judgment against Defendant Curtiss-Wright Corporation in an amount equal to all costs and expenses sustained by Plaintiffs and the other members of the class as a result of the failure and refusal of Curtiss-Wright Corporation to provide such post-retirement health benefits, including but not limited to:

1. All premiums paid to obtain insurance coverage to replace the benefits previously provided by Defendant Curtiss-Wright Corporation; and

2. All direct payments for medical, surgical, hospital and any other medical benefit or service which should have been provided by Defendant Curtiss-Wright Corporation.

E. Judgment granting damages against Defendant Curtiss-Wright Corporation for mental distress and anguish suffered by Plaintiffs and the other members of the class as a result of the failure and refusal of Curtiss-Wright Corporation to provide such promised post-retirement health benefits.

F. Attorneys fees and the costs and disbursements of this action.

G. Such further relief as the Court may deem just.

Dated: May 27, 1985

Respectfully submitted,

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ANSWER TO FIRST AMENDED COMPLAINT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Filed August 29, 1985
[Caption Omitted in Printing]

Defendant Curtiss-Wright Corporation, maintaining a place of business at 1200 Wall Street West, Lyndhurst, New Jersey 07071, answering the Complaint of the plaintiffs says:

Nature of Action, Jurisdiction, Parties and Venue

1. It denies that this action is properly maintained as a class action. Except as so denied, it neither admits nor denies the allegations of paragraph 1, and says further that they constitute legal conclusions to which it is not required to respond.

2. It denies that any benefits or future benefits are due to plaintiffs. Except as so denied, it neither admits nor denies the allegations of paragraph 2 and says further that they constitute legal conclusions to which it is not required to respond.

3. It denies that it breached any agreement to provide benefits to plaintiffs or to the class of individuals plaintiffs purport to represent. Except as so denied, it neither admits nor denies the allegations of paragraph 3, and says further that they constitute legal conclusions to which it is not required to respond.

4. It admits that it is a Delaware corporation. Except as so admitted, it denies the allegations of paragraph 4.

5. It admits the allegations of paragraph 5.

6. It admits that plaintiff Frank C. Schoonejongen was at one time an employee of Curtiss-Wright Corporation, and that he received certain post-retirement health benefits. Except as so admitted, it denies the allegations of paragraph 6.

7. It admits that plaintiff Wesley L. Losson was at one time an employee of Curtiss-Wright Corporation, and that he received certain post-retirement health benefits. Except as so admitted, it denies the allegations of paragraph 7.

8. It admits that plaintiff John S. Dunning was at one time an employee of Curtiss-Wright Corporation, and that he received certain post-retirement health benefits. Except as so admitted, it denies the allegations of paragraph 8.

9. It admits that plaintiff Olga Wolsey was at one time an employee of Curtiss-Wright Corporation, and that she received certain post-retirement health benefits. Except as so admitted, it denies the allegations of paragraph 9.

10. It admits that plaintiff William Martone was at one time an employee of Curtiss-Wright Corporation, and that he received certain post-retirement health benefits. Except as so admitted, it denies the allegations of paragraph 10.

11. It admits that plaintiff William V. Hanzalek was at one time an employee of Curtiss-Wright Corporation, and that he received certain post-retirement health benefits. Except as so admitted, it denies the allegations of paragraph 11.

12. It admits that plaintiff Gerard Abbamont was at one time an employee of Curtiss-Wright Corporation, and that he received certain post-retirement health benefits. Except as so admitted, it denies the allegations of paragraph 12.

13. It admits that plaintiff Joseph Colquhoun was at one time an employee of Curtiss-Wright Corporation, and that he received certain post-retirement health benefits. Except as so admitted, it denies the allegations of paragraph 13.

14. It admits that plaintiff Edward F. Ziek was at one time an employee of Curtiss-Wright Corporation, and that he received certain post-retirement health benefits. Except as so admitted, it denies the allegations of paragraph 14.

15. It admits that plaintiff Melvin DeBlock was at one time an employee of Curtiss-Wright Corporation, and that he

received certain post-retirement health benefits. Except as so admitted, it denies the allegations of paragraph 15.

16. It neither admits nor denies the allegations of paragraph 16 and says further that they constitute legal conclusions to which it is not required to respond.

17. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17.

Factual Background

18. It admits that in or about 1966 it instituted limited health benefits to certain of its retired employees and their eligible dependents; that it bore the cost of certain of the benefits and that it extended benefits to employees who had retired prior to institution of the benefit program. Except as so admitted, it denies the allegations of paragraph 18.

19. It admits that from time to time it distributed to certain individuals booklets and other materials describing its health benefits program for certain employees and retired employees. Except as so admitted, it denies the allegations of paragraph 19.

20. It admits that from time to time its representatives met with various employees and during the course of those meetings described the nature of various post-retirement benefits. Except as so admitted, it denies the allegations of paragraph 20.

21. It denies the allegations of paragraph 21.

22. It admits the allegations of paragraph 22.

23. It denies the allegations of paragraph 23.

24. It denies the allegations of paragraph 24.

Class Action Allegations

25. It denies that this action is properly maintained as a class action and that plaintiffs or the class of individuals they purport to represent are due any health benefits or have any right to future benefits.

26. It denies that the group of individuals described in this paragraph constitutes an appropriate class.

27. It admits that it maintains certain records that contain the names and addresses of various of its employees and former employees. Except as so admitted, it denies the allegations of paragraph 27.

28. It denies the allegations of paragraph 28.

29. It denies the allegations of paragraph 29.

30. It denies the allegations of paragraph 30.

31. It denies the allegations of paragraph 31.

32. It denies the allegations of paragraph 32.

Claims for Relief

Count I

33. It repeats and incorporates by reference its answer as to paragraphs 1 through 32 as if fully set forth herein.

34. It neither admits nor denies the allegations of paragraph 34 and says further that they constitute legal conclusions to which it is not required to respond.

35. It neither admits nor denies the allegations of paragraph 35 and says further that they constitute legal conclusions to which it is not required to respond.

36. It neither admits nor denies the allegations of paragraph 36 and says further that they constitute legal conclusions to which it is not required to respond.

37. It neither admits nor denies the allegations of paragraph 37 and says further that they constitute legal conclusions to which it is not required to respond.

38. It denies the allegations of paragraph 38.

39. It denies the allegations of paragraph 39.

40. It denies the allegations of paragraph 40.

Count II

41. It repeats its answer as to paragraphs 1 through 40 as if fully set forth herein.

42. It denies the allegations of paragraph 42.

43. It denies the allegations of paragraph 43.

44. It denies the allegations of paragraph 44.

45. It denies the allegations of paragraph 45.

46. It denies the allegations of paragraph 46.

47. It denies that plaintiffs or any of them are entitled to the relief set forth in the *ad damnum* clause, or to any other relief.

FIRST SEPARATE DEFENSE

The Complaint fails to state a claim upon which relief can be granted against defendants.

SECOND SEPARATE DEFENSE

The Court lacks subject matter jurisdiction over plaintiffs' claims.

THIRD SEPARATE DEFENSE

This action does not satisfy the requirements for a class action and cannot be maintained as a class action.

FOURTH SEPARATE DEFENSE

Even if this action were otherwise maintainable as a class action—which it is not—plaintiffs are not proper or adequate representatives for the alleged class.

FIFTH SEPARATE DEFENSE

Plaintiffs' action is barred because conditions precedent to eligibility for medical benefits were not fulfilled.

SIXTH SEPARATE DEFENSE

There was no consideration for defendant's alleged promise to pay medical benefits to plaintiffs; any such payments were merely gratuitous.

SEVENTH SEPARATE DEFENSE

By their acts and conduct, plaintiffs are estopped from asserting claims in this action.

EIGHTH SEPARATE DEFENSE

Plaintiffs' claims in this action are barred by the doctrines of waiver and satisfaction and accord.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Defendant
Curtiss-Wright Corporation

By: EDWARD F. RYAN
Edward F. Ryan
A Member of the Firm

Dated: August 29, 1985

JOINT EXHIBIT 54

Admitted into evidence September 28, 1990, in the United States District Court for the District of New Jersey, at Transcript 4.9

CURTISS-WRIGHT EMPLOYEE BENEFIT PLAN TRUST AGREEMENT

TRUST AGREEMENT, hereinafter referred to as the "Agreement," made as of the 1st day of September 1976, by and between CURTISS-WRIGHT CORPORATION, a corporation organized and existing under the laws of the State of Delaware, (hereinafter referred to as the "Company") and NEW JERSEY BANK, incorporated under the laws of the State of New Jersey, (hereinafter referred to as the "Trustee").

WITNESSETH:

WHEREAS, the Company has heretofore adopted an employee benefit plan designated as "Curtis-Wright Employee Benefit Plan" (hereinafter with any amendments thereto referred to as the "Plan") for its eligible employees, and their beneficiaries, thereunder for the purpose of providing for the payment of life, sick and accident benefits covered by Section 501(c)(9) of the Internal Revenue Code of 1954, as amended; and

WHEREAS, certain functions of the Plan are to be administered and serviced by an insurance company ("Service Organization") selected by the Company under the supervision and direction of the Company, which is the Plan Administrator and the Plan Fiduciary.

NOW, THEREFORE, the Company and the Trustee hereby agree that the trust agreement provides in its entirety as follows:

ARTICLE I

The Company hereby establishes, and the Trustee hereby agrees to hold in trust, a trust consisting of cash and such other property acceptable to the Trustee as shall from time to time be paid or delivered to the Trustee and the earnings and profits thereon. All such cash and other property, all investments made therewith and proceeds thereof and all earnings and profits thereon, less the payments which at the time of reference shall have been made by the Trustee, as authorized herein, are referred to herein as the "Fund." The Fund shall be held, managed and administered by the Trustee in trust in accordance with the provisions of this Agreement without distinction between principal and income. At no time prior to the satisfaction of all liabilities with respect to the employees eligible for benefits under the Plan, or their beneficiaries, shall any part of the Fund be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, except to the extent permitted by any applicable law, regulations, or ruling. The provisions of the trust as set forth in this trust agreement are effective as of September 1, 1976.

This Agreement encompasses a number of varied benefits, each of which shall be administered under appropriate procedures provided, from time to time, by the Company, and agreed to by the Trustee.

ARTICLE II

The Trustee shall make payments out of the Fund in accordance with the Plan to such persons, in such manner and in such amounts as may be directed in writing by the Company or as may be specified by checks issued by the Service Organization, and upon any such payment being made, the amount thereof shall no longer constitute a part of the Fund. The Company shall be responsible for the acts of the Service Organization and its administration and service of the Plan. The Trustee shall be responsible only for property actually received by it hereunder, and it shall have no duty or authority to compute any amount to

be paid to it by the Company or to bring any action or proceeding to enforce the collection from the Company of any contributions to the Fund. The Trustee shall not be responsible for the adequacy of the Fund to meet and discharge any and all liabilities under the Plan.

The foregoing provisions of this ARTICLE II with respect to the making of payments shall be deemed to be an allocation of fiduciary responsibility, as between the Company or the Service Organization on the one side and the Trustee on the other, pursuant to and to the extent permitted under Section 405 under The Employee Retirement Income Security Act (hereinafter referred to as "ERISA"), in respect only of the determination of the persons to whom, and the manner and the amounts in which, such payments are to be made, to the extent the same are in conformity with such written directions, and the Trustee shall not be liable for any act or omission of the Company or of the Service Organization, respectively, in carrying out such allocated fiduciary responsibility. To the extent permitted by law, the duties and responsibilities of the Trustee under this ARTICLE II shall be deemed to be limited to the making of such payments as directed by the Company or the Service Organization.

ARTICLE III

Subject to the provisions of ARTICLE IV hereof, the Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested, without distinction between principal and income, in bank certificates of deposit, U.S. Treasury Bills and other fixed income securities bearing maturities not to exceed ten (10) years issued by the U.S. Treasury or issued by corporations, provided such corporate issues are traded on the New York Stock Exchange and carry a Standard & Poor rating of AA or better.

ARTICLE IV

The discretion of the Trustee in investing and reinvesting the principal and income of the Fund shall be subject to such invest-

ment policy and objectives, if any, as the Company may be authorized, from time to time, to establish such investment policy and objectives under the Plan, may adopt from time to time and communicate to the Trustee in writing. It shall be the duty of the Trustee to act strictly in accordance with any such investment policy and objectives as may be communicated to the Trustee from time to time in writing. Any such investment policy and objectives shall be consistent with the purposes of the Plan and the requirements of applicable law.

ARTICLE V

In the administration of the Fund, the Trustee is authorized and empowered, to the extent permitted by applicable law:

(a) To invest in only those securities described in ARTICLE III;

(b) To sell, exchange, convey, transfer or otherwise dispose of any securities or property held by it, by private contract or at public auction, and no person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity, expediency or propriety of any such sale or other disposition;

(c) To register any investment held in the Fund in its own name or in the name of a nominee and to hold any investment in bearer form, but the books and records of the Trustee shall at all times show that all such investments are part of the Fund;

(d) To employ suitable legal counsel and to pay reasonable expenses and compensation therefor; provided, however, that the Company shall have no obligation to pay any such expense or compensation in connection with any claim or liability which arises by reason of a negligent or willful breach by the Trustee of the provisions of this Agreement or breach of its fiduciary duty;

(e) Subject to written authority from the Company, to borrow or raise monies for the purposes of the trust in such amount and

upon such terms and conditions as the Trustee in its absolute discretion may deem advisable; and for any sums so borrowed to issue its promissory note as Trustee and to secure the repayment thereof by pledging all or any part of the Fund; and no person loaning money to the Trustee shall be bound to see to the application of the money or to inquire into the validity, expediency or propriety of any such borrowing; provided, however, that loans or advances may be made by the Trustee hereunder to the Fund, by way of overdrafts or otherwise, on a temporary basis, on which no interest is payable, without need of any authorization or ratification by the Company;

(f) To make, execute, acknowledge and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted.

(g) To settle, compromise or submit to arbitration any claims, debts or damages, due or owing to or from the Trust, to commence or defend suits or legal proceedings and to represent the Trust in all suits or legal proceedings in any court of law or before any other body or tribunal;

(h) To do all other acts the Trustee may deem necessary or appropriate either to carry out any of the Trustee's powers granted under this Agreement, or to perform the Trustee's duties imposed by reason of this Agreement or otherwise by law.

ARTICLE VI

In addition to the expenses referred to in ARTICLE V hereof, the expenses incurred by the Trustee in the performance of its duties, which have been authorized in writing by the Company, including but not limited to fees for actuarial services, accounting services and advisory services rendered to the Trustee, such compensation for the Trustee as may be agreed upon in writing from time to time between the Company and the Trustee, and all other proper charges and disbursements of the Trustee, shall be paid by the Trust. All taxes of any and all kinds whatsoever that may be levied or assessed under existing or future laws upon or

in respect of the Fund or the income thereof, and all fees and other expenses incurred by the Trustee in connection with transactions in securities for the Fund, shall be paid from the Fund without the necessity for the specific direction of the Company.

ARTICLE VII

The Trustee shall discharge its duties under this Agreement solely in the interest of the participants in the Plan and their beneficiaries and for the exclusive purpose of providing benefits to such participants and their beneficiaries with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims in accordance with the provisions of this Agreement insofar as they are consistent with the provisions of ERISA; but the duties and obligations of the Trustee as such shall be limited to those expressly imposed upon it by this Agreement or by applicable law notwithstanding any reference herein to the Plan, or to the provisions thereof it being hereby expressly agreed by the parties hereto that the Trustee is not a party to the Plan.

ARTICLE VIII

The Trustee shall keep accurate and detailed accounts of all investments, receipts, disbursements and other transactions hereunder, and all accounts, books and records relating thereto shall be open to inspection and audit at all reasonable times by any person designated by the Company. Within fifteen (15) days after the end of each month, the Trustee shall provide to the Company and the Service Organization a written report in respect of the Fund's deposits, withdrawals and inventory of holdings. Within ninety (90) days following the close of each fiscal year of the trust and within ninety (90) days after the removal or resignation of the Trustee as provided in ARTICLE IX hereof, the Trustee shall file with the Company a written account setting forth all investments, receipts, disbursements and other transactions effected by it during such fiscal year or

during the period from the close of the last fiscal year to the date of such removal or resignation. Upon the expiration of one hundred twenty (120) days from the date of filing such annual or other account, the Trustee, to the extent permitted by law, shall be forever released and discharged from all liability and accountability to anyone with respect to the propriety of its acts and transactions disclosed in or reasonably to be inferred from such account as though such account had been settled by decree of a court of competent jurisdiction in an action or proceeding in which all interested parties had duly appeared, except with respect to any such acts or transactions as to which the Company shall within such one hundred twenty (120) day period file with the Trustee written objections. To the extent permitted by law, but subject to any express provision of applicable law as may be in effect from time to time to the contrary, no person other than the Company may require an accounting or bring any action against the Trustee with respect to the Fund or its actions as Trustee.

ARTICLE IX

The Trustee may be removed by the Company at any time upon sixty (60) days notice in writing to the Trustee. The Trustee may resign at any time upon sixty (60) days notice in writing to the Company and the Service Organization. Upon such removal or resignation of the Trustee, the Company shall appoint a successor and, upon acceptance of such appointment by the successor trustee, the Trustee shall assign, transfer and pay over to such successor trustee the funds and properties then constituting the Fund. The Trustee is authorized, however, to reserve the amount due it hereunder for payment of its fees and expenses and such sum of money, as to it may deem advisable, for payment of any taxes levied on the trust or income of the trust by any governmental authority having jurisdiction, and any balance of such reserve remaining after the payment of the Trustee's fees and expenses and such taxes shall be paid over to the successor trustee as promptly as possible under the circumstances.

ARTICLE X

The Company shall designate in writing to the Trustee, the person or persons authorized to act in its behalf with respect to the provisions of this Agreement. Such designations shall be acknowledged by the Secretary of the Company and the signatures of the person or persons so designated by the Company shall also be certified by the Secretary. The Trustee shall be authorized to rely upon such designation or designations until notified to the contrary in writing by the Secretary of the Company.

ARTICLE XI

The Trustee shall be fully protected in relying upon written directions of the Company or the checks written by the Service Organization with respect to any disbursements ordered by the Service Organization or the Company.

ARTICLE XII

The Company reserves the right at any time and from time to time by action of its Board of Directors to amend, in whole or in part, any or all of the provisions of this Agreement by notice thereof in writing delivered to the Trustee, provided that no such amendment which affects the rights, duties or responsibilities of the Trustee may be made without its consent, and provided further that no such amendment shall authorize or permit, at any time prior to the satisfaction of all liabilities with respect to the employees eligible under the Plan, or their beneficiaries, any part of the corpus or income of the Fund (other than such part as is required to pay taxes and administration expenses) to be used for, or diverted to, purposes other than for the exclusive benefit of such employees or their beneficiaries, except to the extent permitted by ERISA.

ARTICLE XIII

The Trust whose terms are set forth in this Agreement may be terminated at any time by the Company, and upon such termi-

nation the Fund shall be paid out by the Trustee as and when directed by the Company, in accordance with the provisions of ARTICLE II hereof.

In the case of the termination of the Plan, any residual assets of the Plan may be distributed to the Company at the direction of the Company if all liabilities of the Plan to participants and their beneficiaries have been satisfied and the distribution does not contravene any provision of law.

In case the Plan is terminated in whole or in part by the Company or otherwise as authorized by ERISA or corresponding provisions of any subsequent applicable law in effect at the time the Trustee (subject to the provisions of ARTICLE I of this Agreement and reserving such sums as the Trustee shall deem necessary in settling its accounts and to discharge any obligations of the Fund for which the Trustee may be liable) shall apply or distribute the Fund in accordance with the written directions of the Company. Upon such termination of the Plan in whole or in part, the Trustee shall have a right to have its accounts settled as provided in ARTICLE VIII of this Agreement. When the accounts of the Trustee have been so settled and thereafter the Fund shall have been applied or distributed in accordance with such settlement, except as otherwise provided in ARTICLE VIII of this Agreement, the Trustee shall be released and discharged from all further accountability or liability respecting the Fund (or that part of the Fund so applied or distributed if the Plan is terminated only in part) and shall not be responsible in any way for the further disposition of the Fund (or that part of the Fund so applied or distributed, if the Plan is terminated only in part) or any part thereof so applied or distributed.

ARTICLE XIV

With the exception that an assignment of benefits for medical services actually performed may be made in accordance with the procedures approved by the Company or the Service Organization or provided by the Plan, no benefit which shall be payable out of the Fund to any person (including employees or

former employees of the Company eligible under the Plan or their beneficiaries) shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void; and no such benefit shall in any manner be liable for or subject to the debts, contracts, liabilities, engagements or torts of any such person, nor shall it be subject to attachment or legal process for or against such person, and the same will not be recognized by the Trustee except to such an extent as may be required by applicable law.

If any person who shall be entitled to any benefit hereunder shall become bankrupt or attempt to anticipate, alienate, sell, transfer, assign, pledge, encumber, or charge such benefit, then such benefit shall, in the discretion of the Service Organization or of the Company, cease and terminate, and in that event the Service Organization or the Company may cause the same, or any part thereof, to be held or applied for the benefit of such person, his spouse, children, or other dependents or any of them in such manner and in such proportion as the Service Organization or the Company shall determine. Any claim overpayment or wrongly paid claim shall not inure to the benefit of the employee but shall be returned to the Trustee.

ARTICLE XV

Any subsidiary (as used herein, the term "subsidiary" shall mean any corporation at least a majority of whose voting stock, not including shares having voting power only upon the happening of an event of default or directors' qualifying shares, if any, is at the time owned directly or indirectly by the Company) may, with the approval of the Board of Directors of the Company by resolution of its own Board of Directors adopt the trust whose terms are set forth in this Agreement, as amended from time to time, if such subsidiary shall have adopted the Plan.

Any such subsidiary may at any time segregate the part of the Fund attributable to it and continue the same in accordance with the provisions of this Agreement, as amended from time to time,

as though such subsidiary were the sole creator thereof. In such event, the Company shall direct the Trustee to deliver to itself as Trustee of any such segregated and separate Fund such cash and such securities or other property as may be determined to constitute the proportionate share of the assets then held in respect of employees of such subsidiary, or beneficiaries of such employees. Such subsidiary may thereafter exercise, in respect of such separate and segregated Fund, all of the rights and powers reserved to the Company under the provisions of this Agreement, as amended from time to time.

ARTICLE XVI

Subject to any provisions of ERISA, or other applicable law, which may be applicable and provide to the contrary, this Agreement, as amended from time to time, shall be administered, construed and enforced according to the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective officers thereunto duly authorized and their corporate seals to be hereunto affixed and attested as of the day of year first above written.

CURTISS-WRIGHT CORPORATION

By CHARLES EHINGER
Executive Vice President

Attest:
FRANCIS FALLON
Secretary

NEW JERSEY BANK

By KENNETH HAARDT

Attest:
SOPHIE W. POHL

JOINT EXHIBIT 64

Admitted into evidence September 28, 1990, in the United States District Court for the District of New Jersey, at Transcript 4.9

CONSTITUTION OF CURTISS-WRIGHT EMPLOYEE BENEFIT PLAN

ARTICLE 1—PURPOSES

The Curtiss-Wright Employee Benefit Plan is established by Curtiss-Wright Corporation (hereinafter referred to as "the Company") for the purpose of providing for the payment of life, sick, accident, or other benefits contemplated by Section 501(c)(9) of the Internal Revenue Code of 1954, as amended, to the employees of the Company or their dependents or designated and allowed beneficiaries, under the terms and conditions of such Plan as shall be adopted for the benefit of such employees, dependents or allowed beneficiaries by the Company.

ARTICLE 2—DEFINITIONS

1. *Company.* The term "Company" shall mean Curtiss-Wright Corporation.

2. *Employee.* The term "Employee" shall mean a person intended to be employed for one thousand or more hours in a calendar year or a period of twelve months from an employee's date of hire.

3. *Board of Directors.* The term "Board of Directors" shall mean the Board of Directors of the Company.

4. *Effective Date.* The term "Effective Date" shall mean September 1, 1976.

5. *Employer.* The term "Employer" shall mean the Company and any Subsidiary which shall, with the consent of the Board of Directors, elect to participate in the Plan.

6. *Internal Revenue Code.* The term "Internal Revenue Code" shall mean the Internal Revenue Code of 1954, as amended or superseded.

7. *Participant.* The term "Participant" shall mean an employee who shall have been designated to participate in a Plan, with respect to such Plan.

8. *Plan.* The term "Plan" shall mean a plan or plans adopted by the Company for the benefit of Employees of the Employer.

9. *Subsidiary.* The term "Subsidiary" shall mean any company a majority of the voting power and of the equity of which is owned, directly or indirectly, by the Company.

10. *Trust, Trust Fund and Fund.* The terms "Trust", "Trust Fund", and "Fund" shall mean a trust established by the Board of Directors to hold funds for the purpose of providing benefits payable under the Plan.

11. *Trustee(s).* The term "Trustee" or "Trustees" shall mean the party or parties appointed by the Board of Directors to manage the funds of any Trust.

12. *Constitution.* The term "Constitution" shall mean this document.

ARTICLE 3—ADOPTION OF PLAN AND CONTRIBUTIONS

1. *Adoption of Plans.* The Company, may from time to time adopt plans providing for the payment of life, sick, accident, or other benefits to employees of the Company or their dependents or allowed designated beneficiaries.

2. *Employer Contributions.* To the extent required under the terms of the Plan, the Employer shall make contributions to the Trust which together with Participant contributions are necessary to maintain such Plan on a sound actuarial basis and to support the benefits provided thereunder.

3. *Participant Contribution.* Each participant in this Plan shall make contributions required under the terms of the Plan.

ARTICLE 4—ADMINISTRATION

1. *Authority.* The general administration of the Plan shall be placed in a committee (hereinafter referred to as the "Committee") selected by the Company. The Committee may take such actions as is not inconsistent with the Plan; and enter into all such agreements and insurance policies as shall be deemed necessary or advisable by the Committee in connection therewith. The determination of the Committee as to any disputed question shall be conclusive.

2. *Actuarial Assumptions.* The Committee shall adopt from time to time such morbidity and mortality tables and such rate or rates of regular interest, compounded annually, as may be used in all actuarial calculations required in connection with any Plan. The actuary designated by the Committee shall make periodic actuarial reviews of the Fund and shall certify to the Committee the reasonableness and adequacy of the rates of contributions to the Plan.

3. *Powers.* The Company may appoint one or more committees with such powers as it shall determine; may authorize any agent to execute or deliver any instrument or make any payment on its behalf; and may employ agents to provide for such clerical, accounting, and actuarial services as it may require in carrying out the provisions of the Constitution or the Plan. The Committee may from time to time consult with counsel, who may be counsel for the Company, and shall be fully protected from any loss resulting from reliance upon such advice of counsel in respect of legal questions.

4. *No Compensation or Bonding.* No Committee member shall receive any compensation for services rendered, and no bond or other security need be required of such employee in such capacity in any jurisdiction.

ARTICLE 5—TRUST FUND

1. *General.* The Trust Fund shall be administered by the Trustee in accordance with the provisions of the agreement establishing the Trust.

2. *Establishment of Trust.* The Company shall establish a Trust to provide the benefits under the Plan adopted. All contributions by the Company and Participants shall be paid to the Trustee of the Trust for use in providing benefits and paying expenses not directly paid by the Company. Neither such contributions nor any investment earnings thereon shall be returned to the Company or otherwise used or diverted for purposes other than for the exclusive benefit of employees, dependents or allowed beneficiary and for the payment of expenses, prior to the satisfaction of all liabilities with respect to them, except in the event of an error in computation resulting in overpayment of a contribution by the Participants or Employers.

3. *Qualification of Trust or Trusts.* Since it is the intention of the Company that the Trust created qualify under Section 501(c)(9) of the Internal Revenue Code, the Company shall seek on behalf of the Trust a determination by the Internal Revenue Service that such Trust is exempt under Section 501(c)(9) of the Internal Revenue Code. In the event that such exemption is denied, such Trust shall be terminated and any contributions made shall be returned to the Company and Participants who shall have made such contributions.

ARTICLE 6—AMENDMENT

1. *General.* The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan. No such modification or amendment shall make it possible for any of the funds of the Trust established under the Plan adopted by the Company to be used for or diverted to purposes other than for the exclusive benefit of employees, their dependents, or their

allowed beneficiaries and expenses, prior to satisfaction of all liabilities with respect to them.

2. *Conformity with Law.* Since it is contemplated that the terms of the Constitution and of the Plan adopted by the Company shall at all times be and remain such as to (a) qualify them under the provisions of Section 501(c)(9) of the Internal Revenue Code and to render the contributions, if any, of the Company thereunder deductible under Section 162 of the Internal Revenue Code; and (b) comply with the provisions of any and all applicable and valid federal, state and local laws, ordinances, regulations, and rules, the Company reserves the right to amend the Constitution in any respect appropriate to make it conform with the requirements of the Internal Revenue Code or such laws, ordinances, regulations, or rules. Such amendment may be made effective as of the date of approval in writing or may be made effective retroactively or prospectively.

ARTICLE 7—TERMINATION

1. *Termination by Company.* The Company reserves the right to terminate the Plan established hereby for any reason at any time. In case of termination, the Fund under the Plan shall be used for the exclusive benefit of employees, their dependents, and their allowed beneficiaries as of the time of such termination, except that funds in a Trust not required to satisfy all liabilities of the Fund for benefits and expenses because of an erroneous computation shall be returned to the Company and Participants in proportion to the amounts each such contributor shall have contributed with respect to such Trust.

2. *Termination for Other Reasons.* The Constitution and the Company's liabilities under the Plan shall terminate upon the Company's legal dissolution, adjudication as a bankrupt, making of a general assignment to and for the benefit of creditors.

ARTICLE 8—GENERAL

1. *Participation by Subsidiaries.* With the consent of the Board of Directors, any Subsidiary of the Company may elect to participate in the Plan upon appropriate action by such Subsidiary necessary to adopt the Plan.

2. *Qualification.* The Company shall submit the Plan to the Internal Revenue Service together with the Trust adopted by the Company with a request for a determination as to the qualification of the Plan under Section 501(c)(9) of the Internal Revenue Code. In the event that the Internal Revenue Service determines that the Trust does not so qualify, the Trust shall be terminated.

3. *Inurement of Net Earnings.* No part of the net earnings of Trust under a Plan adopted by the Company shall inure to the Company except as provided by Article 7.

4. *Governing Law.* The validity of the Plan adopted by the Company shall be construed in accordance with the laws of the State of New Jersey or federal law whichever is applicable and shall be regulated and administered under the laws of the State of New Jersey. In the event that any provision of the Plan shall be held invalid or illegal for any reason, such determination shall not affect the remaining provision of the Plan adopted by the Company or any Trust under a Plan adopted by the Company, but the Plan shall be construed and enforced as if such invalid or illegal provision had never been included.

5. *Limitation of Liability.* Subject to provisions of any agreement entered into by the Company, liability of the Company to provide for payment of benefits to persons eligible to receive the same under the provisions of the Plan shall be limited to the assets of the Plan set aside for the payment of benefits under such Plan.

6. *Titles and Headings.* Titles of articles and headings of sections are for general information only and the Plan shall not be construed by reference to such titles and headings.

7. *Masculine and Feminine Words.* Words used in the masculine shall be read and construed in the feminine where they would so apply.

8. *Singular and Plural Words.* Wherever required, the singular of any word used in the Constitution shall include the plural and the plural may be read in the singular.

9. *Spendthrift Clause.* With the exception that an assignment of benefits for medical services actually performed may be made in accordance with the procedures approved by the Company or the Insurer or provided by the Plan, no benefit under such Plan adopted by the Employer shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, or charge and any attempt to do so shall be void, except as specifically provided in any such Plan. No benefit shall be in any manner liable for or subject to garnishment, attachment, execution, or levy, or subject to the debts, contracts, liabilities, engagements, or torts of the person entitled to such benefit. In the event that the Committee shall find that any Participant, dependent, or allowed beneficiary under any Plan has become bankrupt or that any attempt has been made to anticipate, alienate, sell, transfer, sign, pledge, encumber, or charge any of his benefits under such Plan except as specifically provided therein then such benefits shall cease and terminate. In that event, the Committee shall, in its discretion, hold or apply to the same to, or for the benefit of, such Participant, dependent, or allowed beneficiary, his spouse, children, parents, or other blood relatives, or any of them.

CURTISS-WRIGHT CORPORATION

By CHARLES EHINGER

ATTEST: Title Executive Vice President

FRANCIS FALLON, Secretary

Dated March 1, 1977

JOINT EXHIBIT 111

Admitted into evidence September 26, 1990, in the United States District Court for the District of New Jersey, at Transcript 3.4

Form 5500

Annual Return/Report of Employee Benefit Plan

1982

* * * * *

1 (a) Name of plan sponsor (employer if for a single employer plan)

CURTISS-WRIGHT CORPORATION

ONE PASSAIC STREET

WOOD-RIDGE, NEW JERSEY 07075

1 (b) Employer identification number
13 0612970

1 (c) telephone number of sponsor
(201) 777-2900

1 (d) If plan year changed since last return/report, check here ☐

1 (e) Business code number
3725

* * * * *

3 Is the name, address and identification number of the plan sponsor and/or plan administrator the same as they appeared on the last return/report filed for this plan? ☒ Yes ☐ No. If "no," enter the information from the last return/report in (a) and/or (b).

(a) Sponsor ▶ _____

(b) Administrator ▶ _____

4 Check appropriate box to indicate the type of plan entity (check only one box):

(a) ☐ Single-employer plan

(b) ☒ Plan of controlled group of corporations or common control employers

(c) ☐ Multiemployer plan

(d) ☐ Multiple-employer-collectively bargained plan

(e) ☐ Multiple-employer plan (other)

(f) ☐ Group insurance arrangement (of welfare plans)

5 (a) (i) Name of plan ▶ Curtiss-Wright Corporation Employee Benefit Plan

(b) Effective date of plan September 1, 1976

(c) Enter three-digit plan number 5 0 8

* * * * *

Date ▶ 8-15-83

Signature of employer/plan sponsor ▶ /s/ J.F. Staubach, Controller

Date ▶ _____

Signature of employer/plan sponsor ▶ _____

* * * * *

8 Plan amendment information (welfare plans do not complete (b)(ii)):

(a) Was any amendment to this plan adopted in this plan year? No

* * * * *

JOINT EXHIBIT 119, BENEFITS BOOKLET
Admitted into evidence
September 26, 1990,
in the United States District Court for
the District of New Jersey, at Transcript 3.4

[LABEL:] Wesley L. Losson
180 Pines Lake D
Wayne, N.J.
07470

CURTISS-WRIGHT CORPORATION

[handwritten note:] After you retire pg 31

Exempt Health Protection Coverage

Full-time, Exempt, Salaried Employees of Curtiss-Wright Corporation and Some of Its Subsidiaries

[handwritten note:] Received 8/20/83 w/DuBois' letter of 8/18/83 after completion of Prudential Insurance policy and after execution of Blue Cross/Blue Shield contract

Exempt Health Protection Coverage

Full-time, Exempt, Salaried Employees of Curtiss-Wright Corporation and Some of Its Subsidiaries

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INTRODUCTION

Your Health Care Plan has been designed to provide valuable protection for you and your family against the rising cost of medical care.

The Plan pays benefits for a broad range of medical services and supplies, both in and out of the hospital. The Hospital Medical portion of your Health Care Plan is in two parts; the BASIC BENEFITS PLAN (i.e., Basic Hospital Plan and Basic Surgical-Medical Plan) and the MAJOR MEDICAL PLAN. All eligible Hospital/Medical expenses are first considered for benefits under the BASIC PLAN. After the BASIC benefit is determined, then any remaining expenses are considered for benefits under the MAJOR MEDICAL PLAN.

* * * *

COORDINATION OF BENEFITS UNDER THE HEALTH CARE PLAN

The purpose of our Health Care Plan is to help you pay for those costs that you or your dependents actually incur for necessary medical services and supplies. Sometimes because individuals are protected by more than one group plan, the total benefits may exceed the actual expenses. Therefore your Plan has a Coordination of Benefits (COB) feature which combines it with any coverage you may have under other group plans and is designed to guard against overpayments.

The term "group plans" means medical or dental insurance which provides:

- Coverage under a group insurance plan made available by an employer other than Curtiss-Wright including prepayment plans such as Health Maintenance Organization (HMO), group or association coverage for an employee or a dependent made available by an employer. Under some portions of your Plan, student coverage obtained through an educational institution is also considered a group plan,

AND . . .

- Coverage required by statutes such as Automobile No-Fault Laws (in states where coordination is permitted).

It does not mean any personal health care policy you may have, and therefore, COB does not apply to these policies.

When a claim is made, the primary plan pays its benefits without regard to any other plans. The secondary plans adjust their benefits so that the total benefits available will not exceed the allowable expenses. No plan pays more than it would without the coordination provision.

A plan without a coordinating provision is always the primary plan. If all plans have such a provision: (1) the plan covering the patient directly, rather than as an employee's depen-

dent, is primary and the other is secondary; (2) if a child is covered under both parents' plans, the father's is primary (if the parents are divorced or legally separated, the Plan of the parent who has assumed financial responsibility for the dependent child(ren) is primary); (3) if neither (1) nor (2) applies, the plan covering the patient longest is primary.

When ours is the secondary plan and its payment is reduced to consider the primary plan's benefits, a record is kept of the reduction. This amount will be used to increase our Group Plan's payments on the patient's later claims in the same calendar year to the extent there are allowable expenses that would not otherwise be fully paid by our Group Plan and the others.

CONTINUATION OF HEALTH CARE BENEFITS

If You Become Disabled—If you become disabled and are collecting benefits under either the Short Term or Long Term Disability Plans, your Health Care coverage will continue, at no cost to you, provided you and your dependents were enrolled in the Health Care Plan prior to disability and provided the Group Coverage under this Plan remains in force.

If You Are Disabled When Group Coverage Terminates—If you, or an eligible dependent, are totally disabled and/or hospital confined on the date this Plan terminates, benefits will be continued for the person so disabled for a limited period of time. The following outlines the benefits that will be provided under this provision:

- **Blue Cross (Hospital) Benefits**—If a person covered by this Plan is receiving inpatient care in an approved hospital, (as defined on page 2 of this booklet) at the time Plan coverage terminates, hospital benefits will continue to be provided, to the extent available for that confinement, until discharge from the hospital.
- **Basic Surgical-Medical Benefits**—If coverage under this Plan terminates and a covered person is totally disabled on

the date of termination, coverage will be extended under the Basic Surgical-Medical Plan until the earlier of three months from the date of group coverage termination, or recovery.

- **Major Medical Benefits**—In the event of a covered person's total disability on the date coverage under this Plan terminates, coverage will be extended until the earlier of the end of the calendar year following the calendar year in which disability occurred, or recovery.

The extended benefits will apply only to expenses incurred as a result of the condition that caused the total disability.

If You Die—If you die while an active employee, Health Care coverage for your dependents will continue for 180 days from the date on which you died provided your dependents elect to pay the monthly Health Care premium. Your dependents will then have 31 days to convert to an individual policy of health insurance.

After You Retire—During your retirement, as long as the Plan is in operation, you and your covered dependents will have the same Health Care benefits, at no cost to you, with the exception of dental, major medical and prescription drug plans.

However, the Plan will not duplicate any benefits to which you are entitled under Medicare. Once you have attained the age of 65 or become disabled, the Plan will assume that you are covered by both Part A and Part B of Medicare and will pay only the Complimentary Coverage (see section entitled, "Medicare Benefits For The Disabled and Those Age 65 or Over").

If you die during retirement, your dependents' coverage will continue for 180 days from the date on which you died provided your dependents elect to pay the monthly Health Care premium. Your dependents will then have 31 days to apply for an individual policy with either the Prudential Insurance

Company or the Blue Cross Plan or Claims Service Organization.

TERMINATION OF HEALTH CARE BENEFITS

- Coverage for you and your dependents terminates on the last day of the month in which you cease to be an eligible employee of Curtiss-Wright or any of its named subsidiaries which are covered under this Plan.
- Coverage for dependents will cease when he or she no longer meets the definition of an "Eligible Dependent" as described on page 3 of this booklet.
- All coverage under this Plan will cease upon discontinuance of the Plan for any reason.
- Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired.

CONVERSION OPTIONS AVAILABLE

If Plan coverage should terminate, you and your dependents may apply for an individual or family policy with the Claims Service Organizations (currently Blue Cross for hospital coverage and the Prudential Insurance Company of America for surgical-medical coverage) within 31 days following termination of coverage or as provided by law in your state.

When your child is no longer eligible for coverage as a dependent, he or she is responsible for taking prompt action to obtain separate enrollment. To assure uninterrupted protection, an application (or proof of permanent disability) should be sent directly to your Claims Service Organization within 31 days after the date on which your child's coverage terminates.

Your dependent child's coverage terminates on the last day of the month in which he or she attains 19 years of age or 25 (if

a full-time student in an accredited institution) or when you are no longer financially responsible for maintenance of the child.

MEDICARE BENEFITS FOR THE DISABLED AND THOSE AGE 65 OR OVER

When you and/or your spouse reach age 65, it is vital that you enroll for full Medicare coverage, both Parts A and B. Your Plan will assume that you are so enrolled and will not duplicate any benefits that are payable by Medicare whether you have full Medicare coverage or not. This also applies if you become eligible for Medicare at an earlier age because of disability.

Medicare Part A—This part covers hospital services while confined in a hospital and, after a hospital stay, for inpatient care in a skilled nursing facility and for care in your home by a home health agency.

Medicare Part B—This part of Medicare covers doctor's services. It also helps pay for out-patient hospital services and other medical services and supplies not covered by Medicare Part A.

If you are actively employed by the Company when either you and/or your spouse reach 65 years of age, Curtiss-Wright will reimburse you and/or your spouse for the quarterly Medicare Part B premiums provided you have applied for such coverage. See your local Personnel Office for further details.

DUAL CHOICE PLAN

Each year you will be given an opportunity either to retain your Curtiss-Wright coverage or to replace it with that of an approved Health Maintenance Organization (HMO) if available in your locality. However, in order to make such a choice, a contract must have been established between the Company and the HMO in the area in which you live.

If such an option is available to you—and you elect to choose such a plan for yourself and your dependents—the Company will pay the same amount toward the cost of this alternate medical coverage as it will for your Curtiss-Wright coverage. Any additional costs for such a plan—based on the enrollment cost established by that plan—will be paid by you through payroll deductions.

OTHER INFORMATION

The following information is provided to comply with the Employee Retirement Income Security Act of 1974:

OFFICIAL NAME OF PLAN	Curtiss-Wright Health Care Plan for Exempt Employees
TYPE OF PLAN	Welfare
PLAN YEAR	September 1-August 31
PLAN SPONSOR/ ADMINISTRATOR	Curtiss-Wright Corporation One Passaic Street Wood-Ridge, N.J. 07075 Phone: (201) 777-2900
AGENT FOR SERVICE OF LEGAL PROCESS	Same as above
CLAIMS SERVICE ORGANIZATIONS	The Prudential Insurance Company of America Newark, N.J. 07101 Blue Cross of New Jersey Newark, N.J. 07102 Prepaid Prescription Plans, Inc. Shrewsbury, N.J. 07701

PAYMENT OF BENEFITS	Same as above
PLAN IDENTIFICATION NUMBER	508 (Health Care Benefits)
EMPLOYER IDENTIFICATION NUMBER	13-0612970 Curtiss-Wright Corporation 11-1640651 Target Rock Corporation* 22-2377871 Curtiss-Wright Flight Systems, Inc.*
PLAN COSTS	Paid by Employer
CLAIM REVIEW PROCEDURES	If a hospital or surgical-medical claim is denied, the claimant or claimant's beneficiary, upon written request, is entitled to a review of the claim decision. Specific information regarding the procedure to be followed for requesting such a review can be obtained from your Personnel Department.

Who Insures the Plan:

The Health Care Plan is self-funded by the Company.

---

* Subsidiary of Curtiss-Wright Corporation.

Plan Trustees:

The New Jersey Bank
One Garret Mountain Plaza
West Paterson, New Jersey 07424

How the Plans are Administered and Benefits Paid:

Through:

- An administrative services agreement with The Prudential Insurance Company of America, Home Office, Newark, New Jersey 07101 (Phone—201-877-6000) for Health Care Benefits for active and retired employees and their dependents.
- A National Account with Blue Cross of New Jersey, 33 Washington Street, Newark, New Jersey 07102 (Phone—201-456-2000) for Basic Hospital benefits for active and retired employees and their dependents.
- An administrative services agreement with Prepaid Prescription Plans, Inc., 20 White Road, Shrewsbury, New Jersey 07701 for Prescription benefits.

What Are Summary Plan Descriptions

These are the booklets which have been prepared to comply with the provisions of the Employee Retirement Income Security Act of 1974 and serve to outline the terms of the coverage available to you. The complete terms of the coverages are set forth in policies issued by the insurance companies that underwrite the insured benefits and in the plan documents of the other welfare and pension plans.

In case of conflict, the terms of the group insurance policies and plan documents will prevail.

As a participant in the Curtiss-Wright Employee Benefit Program, you have always had a broad range of rights. The Employee Retirement Income Security Act of 1974 (ERISA) formalized this fact and affirms two major concepts:

1. Regular Opportunity for Information on Benefits:

You will receive—

- A Summary Plan Description which explains the major provisions of our various coverages.
- A summary of the Plans annual financial reports.
- A written explanation of why any claim for a welfare benefit is denied in whole or in part and you may request to have such claim reviewed.

You may request:

- To examine, without charge, at the Plan Administrator's office, all relevant plan documents, insurance contracts and items pertaining to the benefit plans which have been filed with the Department of Labor.
- Copies of the above items by writing to the Plan Administrator. A reasonable charge can be made for such copies.

2. Responsible Administration of Benefits:

- Fiduciaries, the people responsible for the Plan's operation, must act prudently and solely in your best interest as a Plan participant.
- No one, including your employer, may take any action or otherwise discriminate against you solely for the purpose of preventing you from obtaining any welfare or pension benefits or from exercising your rights under ERISA.
- A Plan participant may file suit in a federal court for cause, such as failure of the Plan Administrator to provide any of the information described in 1 above, or breach of responsibility by a Plan Fiduciary. A person being sued may have the right to countersue. The court decides who pays your court costs and may require the unsuccessful party to pay all legal costs.

- If you have any questions regarding your rights, you should contact your Plan Administrator. You may also contact an area office of the U.S. Labor-Management Services Administration, Department of Labor.

Plan Continuation—The Company expects and intends to continue this Plan indefinitely but reserves the right to end or amend it.

NOTE: This booklet represents a summary of the main provisions of the Health Care Plan for exempt Curtiss-Wright employees. If this summary disagrees with the actual Plan documents, they will govern all matters. Copies of the Plan documents are on file with the Plan Administrator (and your Personnel Department) and may be examined upon request during normal business hours.

Although the Company expects this Plan to continue in its present form for an indeterminable period, this Plan is not a vested Plan and as such is subject to modification or termination by the Company at any time.

JOINT EXHIBIT 133

Admitted into evidence September 26, 1990, in the United States District Court for the District of New Jersey, at Transcript 3.4

CURTISS-WRIGHT CORPORATION

ONE PASSAIC STREET • WOOD-RIDGE, NEW JERSEY 07075

Richard P. Sprigle
Executive Vice President

November 23, 1983

TO: Wood-Ridge Pensioners

SUBJECT: *Termination of Post Retirement Health Care Coverage*

Dear Pensioner:

As you may have previously been informed, the Corporation announced on September 28, 1983 that all manufacturing operations of the Wood-Ridge Facility will be phased out by November 30, 1983. A recent U.S. Air Force decision to phase out the J-57 engine overhaul program reduced the Wood-Ridge Facility to a non-viable operation.

Since there will no longer be continuing manufacturing operations at Wood-Ridge to support any on-going expenses associated with that Facility, we must advise you that your Curtiss-Wright sponsored and paid post-retirement hospital and medical coverage will be terminated effective at 12:01 A.M., December 1, 1983. *Your monthly retirement income benefits under the Curtiss-Wright Pension Plan will not be affected by this termination, nor will your death benefit under the Pension Plan. Your right to convert your existing health care coverage to private health care coverage will not be affected.*

To assist you in making your decision as to health care coverage to replace the coverage being terminated, the Company compared the premium rates that Blue Cross/Blue Shield

would currently charge a group consisting of you and your fellow retirees for their health care insurance, as contrasted to the existing premium rate for conversion to comparable coverage with Blue Cross and Blue Shield on an individual basis. When Blue Cross and Blue Shield supplied its rates for the converted policy, it was obvious that in a majority of cases the cost to you would be significantly less if you changed over to the conversion policy, rather than participated in your own retiree group.

We are therefore suggesting that if you desire health care protection for yourself and your eligible dependents after November 30, 1983, you should exercise your conversion privilege under the existing group plan, in the manner explained below. A converted policy is an individual plan of insurance whereby you will be responsible for paying the premium on a *quarterly* basis to Blue Cross and Blue Shield. We are advised that the following are the *quarterly* premium rates that will be in effect for the period starting December 1, 1983, depending upon your age and dependent status. The rates are:

QUARTERLY PREMIUMS

Under Age 65	Blue Cross (Hospital)	Blue Shield (Medical/Surgical)	TOTAL
Single	$114.39	$30.03	$144.42
Husband & Wife	215.67	78.09	293.76
Parent & Child	159.06	55.11	214.17
Husband, Wife & Child(ren)	215.67	79.71	295.38

Age 65 & Over (Supplements Medicare)	Blue Cross & Blue Shield TOTAL
Single	$ 72.18
Husband & Wife, Both 65 or over	144.36
Husband & Wife, 1 over, 1 under 65	216.60
Husband & Wife, both 65 or over with Child(ren)	288.78

	Blue Cross & Blue Shield TOTAL
Age 65 & Over (Supplements Medicare)	
Husband & Wife, 1 over, 1 under 65 with Child(ren)	361.02
1 Parent Over 65 with Child(ren)	216.60

You will be directly billed by Blue Cross/Blue Shield of New Jersey for this converted coverage. At the time you receive the bill, you will also receive an enrollment form and a statement explaining the converted coverage. If you do not wish to purchase the coverage, you should not pay this bill. If you do wish to purchase the coverage, it is important for you to complete and return the enrollment form directly to Blue Cross/Blue Shield of New Jersey along with your first quarterly premium payment within 31 days from the date that you are billed by Blue Cross/Blue Shield.

PLEASE NOTE:

You are not required to submit any medical evidence of your insurability if you enroll in the converted plan within the 31 day conversion period.

Your coverage will be effective as of December 1, 1983, so there will be no lapse of coverage between the terminated group coverage and your new individual converted policy.

If you or an eligible dependent are totally disabled or hospitalized as of November 30, 1983, you may have certain transitional rights under the Curtiss-Wright group health care coverage. In this regard, contact the Corporate Benefits Department of Curtiss-Wright Corporation for further details.

If you are under age 65, you will be given the opportunity by Blue Shield to purchase major-medical coverage for an additional premium. This is entirely separate from the conversion privilege. It is an additional option that is being offered to you directly by Blue Shield. If you desire the major-medical

coverage, Blue Shield requires that you also submit a medical questionnaire along with your application. Whether or not you are able to submit satisfactory evidence of insurability for major-medical coverage will have no bearing on your right to receive the converted hospital and medical/surgical coverage.

You are, of course, free to explore any other available alternative means of providing health care coverage for you and your family. However, if you so do, we urge you to act promptly so as to be in a position to exercise the conversion privilege outlined above on a timely basis.

Very truly yours,

/s/ RICHARD P. SPRIGLE
Richard P. Sprigle

JOINT EXHIBIT 137

Admitted into evidence September 26, 1990, in the United States District Court for the District of New Jersey, at Transcript 3.4

Form 5500
Annual Return/Report of Employee Benefit Plan
1983

* * * * *

1 (a) Name of plan sponsor (employer if for a single employer plan)
CURTISS-WRIGHT CORPORATION

Address:
P.O. BOX 810

City or Town, State and ZIP code
HASBROUCK HEIGHTS, NEW JERSEY 07604

1 (b) Employer identification number
13 0612970

1 (c) telephone number of sponsor
(201) 777-2900

1 (d) If plan year changed since last return/report, check here ☐

1 (e) Business code number
3725

* * * * *

3 Is the name, address and identification number of the plan sponsor and/or plan administrator the same as they appeared on the last return/report filed for this plan? ☐ Yes ☒ No. If "no," enter the information from the last return/report in (a) and/or (b).

(a) Sponsor ▶ Curtiss-Wright Corp., 1 Passaic St., Wood-Ridge, N.J. 07075

(b) Administrator ▶ _____

4 Check appropriate box to indicate the type of plan entity (check only one box)

(a) ☐ Single-employer plan

(b) ☒ Plan of controlled group of corporations or common control employers

(c) ☐ Multiemployer plan

(d) ☐ Multiple-employer-collectively bargained plan

(e) ☐ Multiple-employer plan (other)

(f) ☐ Group insurance arrangement (of welfare plans)

5 (a) (i) Name of plan ▶ Curtiss-Wright Corporation Employee Benefit Plan

(b) Effective date of plan
September 1, 1976

(c) Enter three-digit plan number
5 0 8

* * * * *

Date ▶ 9-10-84

Signature of employer/plan sponsor ▶
/s/ Lester E. Davis Ass't Sec'y

Date ▶ _____

Signature of employer/plan sponsor ▶
_____

* * * * *

8. Plan amendment information (welfare plans do not complete (b)(ii)):

(a) Was any amendment to this plan adopted in this plan year? No

* * * * *

ORAL ARGUMENT ON DEFENDANT'S MOTION UNDER RULE 41(b)

Held September 26, 1990

In the United States District Court
for the District of New Jersey

FRANK C. SCHOONEJONGEN, *et al.*, Plaintiffs,

—vs—

CURTISS-WRIGHT CORPORATION, Defendant.

Before: Honorable John W. Bissell,
United States District Judge at Newark, New Jersey.

Appearances:

Lewis, Greenwald, Kennedy, Lewis,
Clifton & Schwartz, Esqs., By:
Everett E. Lewis, Esq. and Ira Cure, Esq.,
Attorneys for Plaintiffs

Carpenter, Bennett & Morrissey, Esqs.,
By: Rosemary Alito, Esq. and Kevin Duffy, Esq.,
Attorneys for Defendant

Proceedings

* * * *

Argument of Counsel

* * * *

By: Judge Bissell

[3.49] Q: Ms. Alito, if I may, on examining the forms, the 5500's for the calendar year 1983, which is exhibit—Joint Exhibit 137, I note entries thereon which indicate that in that calendar year that plan, according to the report, was neither amended nor **[3.50]** terminated.

Is there any particular reason for that?

MS. ALITO: As I stated toward the end of my argument, your Honor, Curtiss-Wright didn't consider this change in language in the 1983 summary plan description to be an amendment to the plan.

It considered it to be a clarification of the prior language with respect to the classes of employees and it thought it had reserved this right to itself throughout and had, in fact, in practice, terminated benefits in connection with the series of other plant closings, so it did not consider this to be an amendment as such to the plan but, rather, a clarification of the language.

* * * *

TESTIMONY OF NOEL ENGLAND

Held September 28, 1990

In the United States District Court
for the District of New Jersey

[caption omitted in printing]

Before: Honorable John W. Bissell,
United States District Judge at Newark, New Jersey.

Appearances:

Lewis, Greenwald, Kennedy, Lewis,
Clifton & Schwartz, Esqs., By:
Everett E. Lewis, Esq. and Ira Cure, Esq.,
Attorneys for Plaintiffs

Carpenter, Bennett & Morrissey, Esqs.,
By: Rosemary Alito, Esq. and Kevin Duffy, Esq.,
Attorneys for Defendant

Newark, New Jersey

Proceedings

* * * *

[4.45] NOEL ENGLAND, having been duly sworn, testified as follows:

By: The Clerk

Q: State your name for the record and spell it.

A: Noel, N-O-E-L, England, E-N-G-L-A-N-D, like the country.

* * * *

Cross-Examination

[4.84] BY MR. KENNEDY:

Q Mr. England, is it your contention that there is something in Joint 45 that advises employees that their post-retirement health insurance benefits would terminate if their facility closed?

Would you like to review it?

A (Witness reviews booklet.)

It seems to me we generally had some kind of a statement, the legal department would advise us as to what went into the text, and I don't know where it normally is.

Q Take your time.

If it's your understanding that Curtiss-Wright had one prior to 1983, why don't you take a look at that [4.85] booklet, in whatever detail you need, to answer that question.

A I assumed it would be in the rear.

MS. ALITO: Your Honor, I object to the witness being asked to do it, because he already testified that he has no independent recollection of this specific booklet, and it would have been one of the individuals who reported to him, his benefits director, that would have been responsible for it.

THE COURT: This man was placed on the stand to testify to the scope of benefits, and it's within the proper scope of direct.

A I see on Page 33 there is a termination of insurance under the heading "General Information."

THE COURT: Speak louder.

THE WITNESS: Page 33 of the booklet under the caption of "General information," there is a sub-heading saying "Termination of Insurance."

Q Read it into the record for us.

A The insurance for yourself and your dependents will terminate if you cease to be an eligible employee or if the group insurance plan is discontinued. A dependent's insurance will terminate when he is no longer an eligible dependent.

Q Is it your understanding that that language advised [4.86] employees if their facility closed, their post-retirement insurance benefits would be terminated?

A I don't know what they—we changed this language over the years. There were times it seemed ambiguous, and we kept trying to, as we did in all of this, to make sure it read properly.

But we certainly intended to advise people that benefits would terminate if a facility was closed down.

Q Isn't it a fact that the first time anybody from Curtiss-Wright Corporation, exempt or nonexempt employee, received written notification of the fact that their post-retirement insurance would conclude if the term—if the facility terminated, was in April of 1983?

A Well, we gave out a letter at that time talking very specifically about the benefits being terminated, as I recall.

THE COURT: His point is: Was that the first time in your recollection there was any such explicit written materials circulated?

THE WITNESS: This booklet here?

THE COURT: No. The letter of April of '83.

THE WITNESS: I think the booklets always contain a provision. I don't remember what it would have said.

Q That is my question.

To use your recollection, either on that booklet or [4.87] some other organization to tell us whether you recall Curtiss-Wright advising its employees, exempt and nonexempt, that

their post-retirement insurance benefits would terminate if their facility closed?

A I don't recall.

I know that the legal department would give us wording for these booklets, and I don't recall what the wording was.

* * * *

TESTIMONY OF RICHARD A. DuBOIS

Held October 1, 1990

In the United States District Court
for the District of New Jersey

[caption omitted in printing]

Before: Honorable John W. Bissell,
United States District Judge at Newark, New Jersey.

Appearances:

Lewis, Greenwald, Kennedy, Lewis,
Clifton & Schwartz, Esqs., By:
Everett E. Lewis, Esq. and Ira Cure, Esq.,
Attorneys for Plaintiffs

Carpenter, Bennett & Morrissey, Esqs.,
By: Rosemary Alito, Esq. and Kevin Duffy, Esq.,
Attorneys for Defendant

Newark, New Jersey

Proceedings

* * * *

[5.3] RICHARD A. DuBOIS, having been duly sworn, testified as follows:

Direct Examination

BY: MS. ALITO

* * * *

[5.12] Q Now, Mr. Du Bois, if an employee came into your office, as corporate director of benefits of Curtiss-Wright; asked to see the plan documents for the medical health insurance plan, what would you say to that employee and what would you show him or her?

A Well, first, I would have to imagine they would come into my office, they would have a specific question in mind, be it a claim or just a question about coverage, it's a provision of the plan. Most likely, I would start with the summary plan description because that's what the employees are most familiar with, that's what they receive; that's what they read.

This is what they perceive to be their benefits are as [5.13] outlined in that booklet. If it required anything further as to documentation, they'd have full access to all documents in the office, that would have included the insurance contracts and the trustee agreements.

* * * *

[5.20] Q I'm going to show you now a document marked as Joint Exhibit 119 and ask you if you recognize that?

A I do.

Q What is that?

A This is the 1983 version of the exempt health coverage plan for exempt employees of Curtiss-Wright.

Q This is the booklet we were just discussing you worked on?

A It is.

Q Would you turn to page 32 of that booklet, please.

Look under the heading of "Termination of Health Care Benefits."

Did you play any part in drafting that language?

A Yes, I did.

Q And did you draft—did you include that language or similar language in your first draft of the booklet in 1981?

A To the best of my recollection I did, yes.

Q At the time that you drafted that language in 1981, were you aware of any plans to close the Wood-Ridge facility?

A No, ma'am I was not.

Q When did you become aware of the fact the Wood-Ridge facility was going to close?

A Towards the latter part of 1983, September perhaps, August.

Q Now, this—this booklet J-119, the 1983 summary plan [5.21] description, was its use limited to the Wood-Ridge facility?

A No, no, not the exempt booklet, used in Wood-Ridge but not exclusively.

Q Were there other facilities in which this was used?

A Yes.

Q Now, if you look again under the heading, "Termination of Health Care Benefits," on page 32, one of the items, the third item under that heading is—no, the fourth item under that heading, it says:

"Coverage under this plan will cease for retirees and their dependents on the termination of business operations of the facility from which they retired."

Did you draft that language?

A I did, yes.

Q When you drafted that language did you consider that to be a change in Curtiss-Wright policy?

A No, ma'am, I did not.

Q Did you consider it to be a clarification?

A I did.

Q And why is that?

A Well, again if we look at the predecessor document, the SPD of 1976—although I could interpret the language of termination in that SPD to mean exactly what this one says, it would I think, be questionable to, if I may, a nonprofessional benefits person, to elicit that same interpretation.

* * * *

[5.22] Q Now, Mr. Du Bois, you mentioned a plant closing of 1980, the Marquette facility.

Did that play any part in your drafting of this more specific language on page 32?

A It did.

Q Can you tell me how that was involved, how the Marquette situation influenced your drafting of this booklet?

A When the plant was closed I was required to go to, I believe it was Superior Court in Cleveland, Ohio, ready to give testimony. I never did have to but I was there, ready to give testimony.

I saw some of the proceedings, some of the confusion and overheard some of the confusion of the people involved in that situation out there. I, at that point, felt it was time because we were about to prepare a new summary plan description, to make—to the extent possible, to make certain that this kind of confusion if it ever occurred again, at least it wouldn't because of ambiguous wording in any summary plan description document that I was responsible for.

* * * *

[5.78]

REDIRECT EXAMINATION

BY: MS. ALITO

* * * *

THE COURT: You testified that you believe that the reference in J-119 specifically toward termination of benefits upon a plant's closure was not a formal amendment of the plan at such time but merely a more specific reiteration of policy?

THE WITNESS: Yes.

THE COURT: During your position Curtiss-Wright do you have a memory of there being a formal recommendation [amendment] to the plan?

THE WITNESS: On this issue, no, sir.

THE COURT: On any other you recall.

THE WITNESS: No, not that I can recall.

THE COURT: Do you have a recollection what mechanism was to be employed in terms of effectuating an amendment by the employer of such plan?

THE WITNESS: Not—not an official amendment. Again in going back to the information I did review historically, there had been some documents already distributed to employees that did contain this language. Others did not. Putting it all [5.79] together, conferring with the legal department, people in the human resources department, to me, became clearly the intent of the company to say the company did have right to terminate.

THE COURT: You might have misunderstood my question.

I'm wondering if you knew what the mechanism was for a formal amendment if one were to have be put through either on this particular subject or any other subject of the health plan?

THE WITNESS: It would have been something I would have worked through the legal department to the executive committee. They would have given official approval on this.

THE COURT: Gone as high as the board of directors.

THE WITNESS: Perhaps not board of directors but executive board, chaired by the executive vice-president.

* * * *

[5.84]

RECROSS EXAMINATION

BY: MR. KENNEDY

* * * *

You, in reference to the amendment procedure for the health plans maintained by Curtiss-Wright, referred to an executive committee chaired by the vice-president?

A Yes.

Q Can you tell us who the members of that executive committee are [o]r were I should say in and around the '80 to '83 time period?

A In the framework of that kind of a decision that would have been a committee consisting of the executive vice-president, probably labor counsel, perhaps general counsel, executive director of labor relations or industry relations, I should say, and myself.

Q And the role of that committee would have been to pass upon the appropriateness of any amendments contemplated into the plan?

A That would be the approach this committee would take, yes.

Q How would the decisions of that committee be reflected, minutes of the meeting be adopted or memorandum be authored?

A I would imagine so. We did not have many of those types of committee meetings but I would imagine there certainly would be a record of the meeting being held whatever was adopted, yes.

[5.85] Q And just so the record is clear, no such commission letter, no such memorandum was authored with respect to this decision to include the termination language in the 1983 summary plan description for the exempts. Is that correct?

A I don't know that's necessarily true. There were various disciplines in the organization in the formation of that. I did draft it after conference with the legal department. I'm certain the executive vice-president was aware of that language as it was in draft form.

Although it might not been an official committee action, again I did not think it would be necessary to have committee action because we were trying to clarify what we believe policy to have been right along.

Q My question for the record, this wasn't because you didn't think this was applied to any official committee action?

A That's correct.

* * * *

TESTIMONY OF AARON J. CARR

Held October 1, 1990

In the United States District Court
for the District of New Jersey

[caption omitted in printing]

Before: Honorable John W. Bissell,
United States District Judge at Newark, New Jersey.

Appearances:

Lewis, Greenwald, Kennedy, Lewis,
Clifton & Schwartz, Esqs., By:
Everett E. Lewis, Esq. and Ira Cure, Esq.,
Attorneys for Plaintiffs

Carpenter, Bennett & Morrissey, Esqs.,
By: Rosemary Alito, Esq. and Kevin Duffy, Esq.,
Attorneys for Defendant

Newark, New Jersey

Proceedings

* * * *

[5.110] AARON J. CARR, having been duly sworn, testified as follows:

Direct Examination

BY: MS. ALITO

* * * *

[5.113] Q Can you—let's take the constitution. Can you tell us where the constitution, that section on amendments or termination is?

A Well, section for amendment is Article VI. The section for **[5.114]** termination is Article VII.

Q And did you in those sections intend to reserve to Curtiss-Wright the intent, your right to amend or terminate?

A Oh, yes.

* * * *

A It was my understanding that we would have the unfettered right to control these plans whether to amend it, to terminate it, we reserved this right to ourselves. To control it absolutely.

Q Did you express any limitations on the right to amend either the trust agreement or the constitution?

A Limitations, no, not that I'm aware of.

How we—the employee benefit trust agreement is a little bit different because I think, for amendment or termination, that had to go through the board of directors.

Other than that, I don't remember cutting short our reservation at all to amend or to terminate.

Q Now, Mr. Carr, what was the purpose of the constitution of the Curtiss-Wright Employee Benefit Plan?

A It was a document to help formulate what the plan was in conjunction with the booklets or the contracts which describe **[5.115]** the benefits.

We did not want to put the benefits into the constitution for the reason that we didn't want to change the constitution every time we changed they benefits.

* * * *

[5.116] Q Did there come a time when you were called upon to take part in the preparation of booklets like that?

A Yes, summary plan descriptions, yes.

Q When was that?

A Well, during Mr. DuBois' tenure he was trying to get out a booklet and I was called upon in—for preparation of that booklet.

Q Okay. I'm going to show you a document that's been marked into evidence as Exhibit J-119.

Is that the booklet that you worked on with Mr. Dubois?

A Yes.

Q Do you recall, Mr. Carr, what time period it was that you and Mr. Du Bois were working on that booklet?

A It was approximately 1980.

Q Is there any reason why that time period sticks in your mind?

A Yes.

Q Can you explain?

A Mr. Du Bois—let's see. On page 32 of the booklet that **[5.117]** was responsible for that clause which said, "Coverage under this plan will cease for retirees and their dependents on the termination of business operation of the facility from which they retire."

Well, my recollection is slightly different. My recollection is that I was responsible for adding it because it was an obvious redundancy what was there before.

The reason I put it there was that I had become aware of the Yardman (phonetic) decision very early on. And I was flabbergasted by the decision.

I wanted to make sure that our booklet spelled out in no uncertain terms that the company had the unfettered right to terminate this plan. And it did. But I went one step further.

Q What is your recollection of when the Yardman decision came out, is that the District Court or the Circuit Court opinion?

A What happened was, I was unaware of the decision but obviously the UAW must have reported in one of its publications.

That segment that was reported was outlined in red and dropped off on Vince Kunz's desk. Vince Kunz was the manager of labor relations for the Wood-Ridge facility. His office was downstairs from mine. Little ways away but downstairs. He brought it up, showed it to me. This would have been about 1980 also.

Q Some time in that area?

A Yeah, sometime.

[5.118] Q Okay. Let's get this straight about you and Mr. Du Bois working together.

You're telling us now that this particular phrase in the termination section was your idea?

A I didn't see it when the first draft came to my desk.

Q That first draft was prepared by whom?

A Mr. Du Bois' department.

Q And did you thereafter work with Mr. Du Bois on subsequent drafts and the language?

A Yeah. This clause in particular I did. I inserted it.

What draft it came back in I don't know but it was after I saw the first draft I wanted to be completely sure. I don't remember when I saw the first draft. But it may have been a galley. I'm not sure.

Q In any event, you and Mr. DuBois, I take it, worked on this together?

A Yes.

Q Now, Mr. Carr, when you worked with Mr. Du Bois in adding this language, specifically the language about the plant closing, page 32, of the 1983 summary plan description, did you consider that to be a change in Curtiss-Wright policy?

A No.

Q Why is that?

A I had drafted the constitution and I had expressed the unfettered ability to Curtiss-Wright to terminate the plan or to **[5.119]** amend it to any degree.

I also experienced the Marquette closedown which we terminated the plan. We terminated the health benefits and there was a lawsuit out of that, by the way as Mr. Du Bois had said, and I was the attorney that settled that lawsuit.

I also had known from my experience in reading the files on the 1970 shutdown of the East Paterson facility. It was very clear in my mind.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 93-1935

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, et al.,

Respondents.

ORDER ALLOWING CERTIORARI.

Filed September 26, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. Rule 29.2 does not apply.

September 26, 1994

No. 93-1935

Supreme Court, U.S.
FILED
NOV 7 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), require an employee benefit plan to identify specific individuals within the sponsoring organization who have authority to amend the plan, or otherwise require an amendment procedure more detailed than that inherent in an express reservation of the sponsor's right to amend the plan?

2. Does the validity of an amendment incorporated in an ERISA plan document depend on whether the plan contains an amendment procedure complying with ERISA § 402(b)(3)?

3. Does a procedural violation of ERISA, such as the absence of an amendment procedure in the plan, that causes no harm to plan participants give rise to a substantive remedy affecting benefit entitlements?

PARTIES TO THE PROCEEDING

All parties to the proceedings below are parties before this Court. The named respondents are Frank C. Schoonejongen, Wesley L. Losson, John S. Dunning, William Martone, William V. Hanzalek, Edward F. Ziek, Melvin Deblock, Joseph Colquhoun, Joseph Majerscak, Gerard Abbamont, and Olga Wolsey. The named respondents represent a class consisting of retired, nonbargaining-unit employees from petitioner's former Wood-Ridge, New Jersey, facility.

The petitioner is Curtiss-Wright Corporation. Pursuant to Rule 29.1 of the Rules of the Court, petitioner states, as previously stated in its petition, that it has no parent or subsidiary corporations (except wholly owned subsidiaries).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1935

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinions of the United States District Court for the District of New Jersey are not reported. (Pet. App. 34, 42).[1] The original opinion of the United States Court of Appeals for the Third Circuit, issued December 28, 1993, and its March 3, 1994 order granting rehearing and vacating its original opinion are unreported. (Pet. App. 17, 107). Its final opinion is reported at 18 F.3d 1034. (Pet. App. 1).

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[1] "Pet. App." refers to the Appendix to the Petition. "J.A." refers to the Joint Appendix filed with this brief. "C.A. App." refers to the Joint Appendix filed with the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals as to which review is sought was entered on March 3, 1994. (Pet. App. 1, 111). The petition for writ of certiorari was filed on June 1, 1994, and was granted on September 26, 1994. (J.A. 80). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, are set forth in the appendix to this brief.

STATEMENT OF THE CASE

1. Introduction

This case arises from a plan sponsor's termination of non-vested employee welfare benefits under a voluntarily adopted plan. On November 30, 1983, petitioner, Curtiss-Wright Corporation ("Curtiss-Wright" or the "Company"), terminated plan health insurance benefits for respondents and other non-bargaining-unit retirees from its Wood-Ridge, New Jersey, facility when it closed that facility due to the loss of a military contract essential to its continued operation.[2] (Pet. App. 3, 6; C.A. App. 778-79, 1102-03). Respondents filed a complaint in the United States District Court for the District of New Jersey, in which they asserted a claim for benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). After a bench trial, the District Court found that plaintiffs' health insurance benefits had not vested. Nonetheless, it held that the termination of those benefits was unlawful, concluding that the amendment authorizing the termination of benefits was invalid

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[2] Under the plan, all affected retirees had the option of converting to individual policies. (J.A. 49).

because the plan did not contain an amendment procedure complying with ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3). The court entered judgment awarding $2,681,086 in past health insurance benefits to plaintiffs. On Curtiss-Wright's appeal and plaintiffs' cross-appeal, the United States Court of Appeals for the Third Circuit affirmed.

2. The Curtiss-Wright Welfare Benefits Plan

In 1966, Curtiss-Wright unilaterally began providing health insurance benefits to nonbargaining-unit retirees from its Wood-Ridge, New Jersey, facility. (Pet. App. 115-16). Over the years, Curtiss-Wright periodically changed both insurance carriers and the terms of coverage. One thing never changed: As stated in summaries distributed to participants and in other documents, Curtiss-Wright always retained the right to modify or terminate benefits. (Pet. App. 116-18; C.A. App. 173, 228, 277, 287, 296-97, 357).

In 1976, in order to bring its benefit plans into compliance with ERISA, Curtiss-Wright established a Constitution as a general plan instrument. (Pet. App. 4; J.A. 34). In addition to reserving "the Company's" right to terminate the plan "for any reason at any time," the Constitution provided:

> The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan.

(Pet. App. 4; J.A. 37-38). Various documents distributed to participants reiterated these reservations of rights. (Pet. App. 4-5, 35-36, 67-69).

The Constitution incorporated as plan documents other materials setting forth the terms and conditions of benefits more specifically, including current summary plan descriptions. (Pet. App. 4; J.A. 69, 76; C.A. App. 1252).

3. The Amendment at Issue

In early 1983, Curtiss-Wright, as it had done in the past, issued a revised plan description in connection with a switch in insurance carriers. The District Court found that this 1983 plan description was "the governing document" setting forth the terms of the plan applicable to plaintiffs. (Pet. App. 38).

Among other changes, this 1983 plan document set forth the amendment at issue:

> Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired.

(Pet. App. 5-6; J.A. 49). The revised plan description, and this language in particular, was drafted by the Company's Corporate Director of Benefits, Richard DuBois, and its Labor Counsel, Aaron J. Carr; and it was reviewed and approved as part of the plan by the Company's Executive Vice President, Charles Ehinger. (J.A. 69-70, 73-74, 77-78). These were the executives responsible for administering the plan and the same executives (or, in Mr. DuBois' case, his predecessor) who had established the plan Constitution in 1976. (*Id.*; C.A. App. 1231).[3]

---

[3] Messrs. DuBois and Carr testified at trial that because Curtiss-Wright already had reserved the right to terminate the plan "for any reason at any time" (J.A. 38), they regarded the termination language added in 1983 as a "clarification" of Curtiss-Wright's existing rights under the plan, rather than the creation of a new right. (J.A. 70-71, 79). Both were unequivocal, however, that this language was intended—like the language in the previous plan descriptions it replaced—to be part of the plan terms. (J.A. 69, 70-71, 77). And, as the District Court found, the document to which this language was added was "the governing document" of the plan. (Pet. App. 36, 38-39).

Curtiss-Wright had a business reason for linking the continuation of retiree benefits for a particular facility to the continued operation of that facility. Health benefits for each facility's employees and retirees were supported by and charged to that facility's ongoing contracts (almost all of which were government defense contracts) as overhead. (Pet. App. 115-16). Thus, as an inherent aspect of the plan, the continuation of health benefits depended on the continued operation of the relevant facility.

4. The Termination of Benefits

After losing a military contract vital to the continued operation of the Wood-Ridge facility, Curtiss-Wright closed the facility effective November 30, 1983. (J.A. 56-59; C.A. App. 719). Curtiss-Wright previously had notified the affected retirees that the Wood-Ridge facility was being closed and that health insurance benefits therefore would be terminated. (*Id.*). All affected retirees were given the option of converting to individual policies. (*Id.*).

5. The District Court Decision

After trial, the District Court, as trier of fact, found that Curtiss-Wright had reserved before 1983 the rights to terminate or amend the plan and held that plaintiffs' benefits had not vested. (Pet. App. 35-36). The District Court concluded, however, that the lawfulness of the termination of plaintiffs' benefits depended on the validity of the 1983 amendment. (Pet. App. 37). Although it found that the amendment had been incorporated in a "governing document" of the plan applying to plaintiffs and that plaintiffs had received timely notice of the amendment, the District Court held that the amendment was invalid because the plan did not provide an amendment procedure as required by ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3). (Pet. App. 37-39). The District Court entered judgment requiring Curtiss-Wright to pay $2,681,086 in past benefits to plaintiffs. (Pet. App. 105).

6. The Court of Appeals Decisions

On Curtiss-Wright's appeal and plaintiffs' cross-appeal, the Court of Appeals for the Third Circuit affirmed the District Court's judgment. (Pet. App. 16). The Court of Appeals agreed that Curtiss-Wright had reserved the rights to amend or terminate the plan and that plaintiffs' benefits had not vested. (Pet. App. 2, 13-15). But it also agreed that Curtiss-Wright did not properly terminate those benefits. (Pet. App. 2, 12).

In its original opinion, filed December 28, 1993, the Court of Appeals rejected Curtiss-Wright's argument that its express reservation of the right to terminate the plan for any reason encompassed the lesser right to terminate plaintiffs' benefits without amending the plan because, the court reasoned, Curtiss-Wright would still have been required to comply with "termination procedures" prescribed under ERISA § 4041(b), 29 U.S.C. § 1341(b). (Pet. App. 23-25). On rehearing, the Court of Appeals vacated its original decision and issued a new opinion, no longer relying on § 4041(b). Instead, the court rejected the argument by construing ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1), to require "notice of plan termination,"[4] and finding that the notice provided to plaintiffs of the amendment and of the termination of their benefits did not constitute such notice. (Pet. App. 12). The rest of the court's decision remained unchanged.

The Court of Appeals affirmed the District Court's finding of a violation of § 402(b)(3), which requires a procedure for amendment and "identifying the persons who have authority to amend the plan." Although ERISA § 3(9), 29 U.S.C. § 1002(9), defines "person" to include a "corporation," the Court of Appeals held that Curtiss-Wright's plan violated § 402(b)(3) because it provided for amendment by "the Company" rather than by specific individuals. (Pet. App. 8). Although the amendment had been incorporated in a plan document distributed to plan participants, the court reasoned that the statutory purpose of ensuring that participants can rely on the plan documents required striking the amendment. (Pet. App. 10-11). To invalidate the amendment, the court relied exclusively on its conclusion that the plan failed to comply with § 402(b)(3), effectively acknowledging that the amendment met all other prerequisites of a valid and effective amendment. (Pet. App. 9-11, 14-15 & n.4).

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[4] On its face, ERISA § 104(b)(1) sets forth no such requirement.

SUMMARY OF ARGUMENT

By holding that the amendment procedure in Curtiss-Wright's employee welfare benefit plan failed to comply with § 402(b)(3) of ERISA and that the amendment at issue was invalid, the decision below unsettles countless plans. Many pension and welfare plans—including any that follow the prototype language published by the Internal Revenue Service—have amendment provisions substantively identical to the one in Curtiss-Wright's plan. Under the decision below, all of those plans violate § 402(b)(3). Many, if not all, of those plans also have been amended over the years. Under the decision below, the terms of any such plans are now uncertain: Any amendments—including those that for years have been included in the plan documents and followed as controlling plan terms—may be invalid. This result contravenes ERISA for several reasons.

1. A plan that expressly reserves the plan sponsor's right to amend, and so provides for amendment by the sponsor, does not violate § 402(b)(3). The Court of Appeals held to the contrary by creating a requirement not imposed by the statute: that plans identify the individuals within a company or other sponsoring organization who may exercise its amendment authority. This construction conflicts with the plain language of the statute. Section 402(b)(3) requires only a procedure for identifying "persons" with amendment authority, and ERISA defines "person" to include corporations and other entities. ERISA § 3(9), 29 U.S.C. § 1002(9). It also conflicts with the interpretation of § 402(b)(3) by the Internal Revenue Service, whose own prototype pension plan amendment provision is nearly identical to the one set forth in Curtiss-Wright's welfare benefit plan. Further, the amendment provisions in Curtiss-Wright's plan and in the IRS prototype plan fulfill the fundamental purpose of § 402(b)(3): to promote the identification of amendments. To plan participants, a company's publication

of revised plan documents is unmistakably an amendment of the plan terms by the company.

2. Even if there had been a violation of § 402(b)(3) in this case, that should not give rise to the remedy of striking an amendment from the plan documents.

a. The validity of an amendment does not depend on the plan's compliance with § 402(b)(3). *See Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990); *Biggers v. Wittek Industries, Inc.*, 4 F.3d 291, 295 (4th Cir. 1993). Neither the statute's text nor its purpose requires otherwise. Instead, following analogous principles of trust law, when the plan instrument does not contain an amendment procedure, the validity of an amendment should be determined based on whether the amendment was promulgated in a way that sufficiently manifests the intent that it be a term of the plan. *See Biggers, supra* (citing *Restatement, Second, of Trusts* § 331). There is no clearer way for this to be done, nor is there a way more consistent with the purposes of § 402(b)(3) or ERISA as a whole, than for a plan sponsor to promulgate and publish an amendment by revising the governing document of the plan.

b. Instead of serving the purpose of ERISA, the remedy created by the Court of Appeals in this case weakens two fundamental statutory policies. First, ERISA's remedial provisions reflect a careful balancing of the regulation of benefit plans and the costs of compliance. *See, e.g., Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 2072, 124 L.Ed.2d 161, 174 (1993). The decision below upsets this balance by failing to distinguish between a violation of § 402(b)(3) that causes substantive harm and one that does not. The violation found caused no harm to any plan participant because the amendment conformed with the plan's express reservation of the right to amend and was set forth in the plan's published governing document. The remedy holds Curtiss-Wright liable for doing what it had the acknowledged right to do under

ERISA and the plan: terminate nonvested welfare benefits. The decision below thereby would impose liability without regard to harm. The result is precisely what Congress sought to avoid: undue costs and liabilities that provide employers with substantial disincentives against creating or maintaining benefit plans at all.

c. Second, ERISA's written instrument and disclosure requirements seek to ensure that the current plan terms are defined in the current plan documents. That is essential to the ability of participants, as well as sponsors, fiduciaries, and administrators, to know precisely what their respective rights and obligations are under their plans. Indeed, without that certainty, the sponsorship and administration of benefit plans becomes a dangerous enterprise, fraught with unforeseeable potential risks and liabilities. By striking an amendment set forth as a plan term in the governing plan document, the decision below erodes the integrity of the plan documents. Contrary to ERISA's design, the plan documents are no longer dispositive of the plan terms.

The remedy fashioned by the Court of Appeals is not required by § 402(b)(3) and disserves the broader policies of ERISA. Since the consequence of a failure to comply with § 402(b)(3) is not expressly defined by ERISA, it should be defined by reference to these basic policies.

ARGUMENT

I. An Express Reservation of the Plan Sponsor's Right to Amend the Plan Satisfies § 402(b)(3) of ERISA.

Section 402(b)(3) of ERISA requires that every employee benefit plan "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." The statute does not define what type of procedure must be set forth, nor does it require a detailed procedure.

To hold that Curtiss-Wright's plan did not comply with § 402(b)(3), the Third Circuit interpreted the statute to require the designation of specific individuals with amendment authority. The court previously had held that a reservation of the right to amend may itself set forth a general procedure for amendment—specifically, that the reservation "the Trustees may amend or modify this plan" effectively set forth the amendment procedure "modification by 'the Trustees.' "[5] Here, the amendment procedure thus set forth by Curtiss-Wright's plan was amendment "by the Company." The Third Circuit reasoned, however, that this procedure failed to satisfy § 402(b)(3) because it did not identify "what individuals or bodies within the Company could promulgate an effective amendment." (Pet. App. 8). In this way, the court distinguished the procedure "by the Company" from procedures such as "by the Trustees" or "by the Board of Directors." (*Id.*)

This interpretation of § 402(b)(3) ignores the plain language of the statute. Section 402(b)(3) requires a procedure for identifying "persons" with amendment authority. "Person" is a defined term under ERISA; it specifically includes corporations and other entities that could be plan sponsors. ERISA § 3(9), 29 U.S.C. § 1002(9). Thus, § 402(b)(3) expressly allows a plan to identify the corporate sponsor (or other sponsoring organization), without more, as the "person" with amendment authority. Nothing in the statute requires a plan to identify further, by name or title, specific individuals within the corporation who may execute its amendment authority.

Further support is found in the interpretation of § 402(b)(3) by the Internal Revenue Service. The IRS has construed the statute to require no more than the general procedure inherent in an express reservation of the right to amend. Thus, its prototype pension plan provides as to amendment only that

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[5] *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 105-06 (3d Cir. 1990), *petition dismissed pursuant to Rule 46*, 61 U.S.L.W. 3523 (1993).

"the sponsoring organization may amend any part of the plan." 2 *Pension Coordinator* ¶ 13,181 at 13,276R-124 (R.I.A. 1994).[6] The IRS prototype plan thus reflects the agency's view that "by the sponsoring organization" or "by the Company" sufficiently identifies both the person with authority to amend and the procedure for amendment.[7] The IRS shares responsibility for the administration and enforcement of ERISA,[8] and its prototype plan, like the published Revenue Procedures of which the prototype is a part, reflects an official interpretation of the statute.[9] Its view of § 402(b)(3), therefore, is entitled to considerable deference. *See Mead Corporation v. Tilley*, 490 U.S. 714, 722 (1989).

The IRS interpretation accords with the purpose of § 402(b)(3). The statute's purpose is to promote the clear identification of amendments. *See* pp. 17-20, *infra*. Participants and fiduciaries must be able to know both that the plan has been amended and what the new terms are. As this case reflects, a procedure for amendment "by the Company" may fulfill that purpose just as effectively as a more specific pro-

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[6] Reprinting the IRS List of Required Modifications form distributed to sponsors of master and prototype pension benefit plans, as derived from Rev. Proc. 89-9, 1989-1 C.B. 780.

[7] *See also Godwin v. Sun Life Assur. Co.*, 980 F.2d 323, 327 n.10 (5th Cir. 1992) (finding that the "amendment procedure, in general, was proper" where the plan document authorized written amendments "if agreed to by a representative of the company," although the court did not address § 402(b)(3) specifically); *Musto v. American General Corp.*, 861 F.2d 897, 901 (6th Cir. 1988) (upholding validity of an amendment to a welfare benefit plan where the plan document provided for amendment "by announcement of Company"), *cert. denied*, 490 U.S. 1020 (1989).

[8] Under Title II of ERISA, the Treasury Department exercises authority jointly with the Department of Labor. *See, e.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517-18 & n.13 (1981).

[9] *See* 2 *Pension Coordinator, supra*, ¶ 13,181 at 13,276R-1. *See also* 26 C.F.R. § 601.601(d); Rev. Proc. 89-14, 1989-1 C.B. 814.

cedure. The amendment in question was promulgated by the revision of the plan's governing document. The revised plan document was drafted, reviewed, approved, published, and distributed by the responsible Company executives—up to and including the Company's Executive Vice President. (J.A. 69-71, 73-74, 77-78). As far as the benefit plan was concerned, the actions of these executives were the actions of the Company; in fact, the same executives had established the plan Constitution in 1976 and indisputably were the executives responsible for administering the plan on behalf of the Company. (*Id.*)[10] Further, the revised plan document was distributed to participants by Curtiss-Wright and available at its benefits office. (J.A. 43, 69; C.A. App. 1188). From the perspective of plan participants, the revised plan document could only be understood as an amendment of the plan terms "by the Company."

A plan sponsor may, of course, limit its amendment power more specifically than did Curtiss-Wright. It may, for example, confine the power to particular individuals named in the plan or require various procedural bells and whistles. But nothing in § 402(b)(3) precludes the more general approach adopted by the IRS in its prototype plan, by Curtiss-Wright in the plan at issue here, and by countless other plan sponsors in their plans.[11] We submit, therefore, that the court below erred

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[10] *See, e.g., Aronson v. Servus Rubber, Div. of Chromalloy*, 730 F.2d 12, 15 (1st Cir.), *cert. denied*, 469 U.S. 1017 (1984). There, the plan provided for termination "by the company," *i.e.*, the plan sponsor, but did not "requir[e] the company to manifest its action in any particular manner." The court held that action by the company's vice president complied with the plan.

[11] *See, e.g.*, Sherwin P. Simmons, "Third Circuit Shocks Pension Practioners," 63 Tax Notes 335 (April 18, 1994); K.P. O'Brien & L. Meyer, "Selective Developments Affecting Qualified Plans: Of Same Desks, Plan Spinoffs and Mergers, and Plan Procedures," NYU 52d Inst. on Fed. Tax.—Employee Benefits & Executive Compensation § 10.04, at pp. 10-22 to 10-23 (Matthew Bender 1994) (hereinafter "O'Brien & Meyer").

by concluding that the amendment provision in Curtiss-Wright's plan failed to comply with § 402(b)(3).

In opposition to the petition for certiorari, plaintiffs sought to avoid the issues presented for review by contending that Curtiss-Wright had not effectively amended the plan whether or not the plan complied with § 402(b)(3). To invalidate Curtiss-Wright's amendment of the plan, however, the Third Circuit relied exclusively on its conclusion that the plan failed to comply with § 402(b)(3). While the court repeatedly had declined to decide the validity of plan amendments based on compliance with § 402(b)(3) when it was not necessary to do so, the court here concluded that "this case requires that we now reach that issue." (Pet. App. 9-10). The court thereby acknowledged that Curtiss-Wright's amendment met all other prerequisites of a valid amendment. (*See also* Pet. App. 9 n.4). The questions presented to this Court for review therefore are properly limited to those involving the construction and effect of § 402(b)(3).

The record confirms the inconsequence of plaintiffs' arguments. First, plaintiffs contended that Curtiss-Wright failed to comply with an unwritten practice identified at trial by its Corporate Director of Benefits, Mr. DuBois—that the plan would be amended by "work[ing] through" Curtiss-Wright's legal department and an executive committee. (J.A. 72-73). Any such unwritten practice, however, would not be part of the plan[12] and so could not define the validity of plan amendments incorporated by the plan sponsor in the plan documents. In any event, Mr. DuBois's testimony also reflects that the unwritten practice he identified had been followed in this case because the amendment had been promulgated by the legal department and executive committee members, specifically, Messrs. DuBois, Carr, and Ehinger. (J.A. 73-74).

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12 *See* ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), which requires that every employee benefit plan be in writing.

Second, plaintiffs contended that Curtiss-Wright intended the termination language added to the plan to be a "clarification" rather than an "amendment." But the point under ERISA is what Curtiss-Wright did in the governing plan document, not how it may or may not have subjectively characterized what it did. Plan participants would only know and be affected by the former. Further, Messrs. Carr and DuBois testified that the revised language was intended—like the language in the previous plan descriptions that it replaced—to be part of the plan terms. (*See* p. 4 n.3, *supra*). The District Court agreed, recognizing that the language was added to the governing plan document and intended to be a plan term (Pet. App. 36-37), and the Court of Appeals recognized that Curtiss-Wright satisfied all requirements for a valid amendment other than compliance with § 402(b)(3). (Pet. App. 9-10 & n.4). In this context, whatever theoretical distinction might lie in calling the revision an amendment or a clarification is immaterial. What matters is that the plan terms as set forth in the governing plan document were revised by the Company. Thus, the plan was amended pursuant to the plan's amendment procedure.

II. The Validity of an Amendment Incorporated in the Plan Documents Does Not Depend on Compliance with § 402(b)(3) of ERISA.

A. Neither the Text nor the Purpose of the Statute Conditions the Validity of an Amendment on a Plan's Compliance with § 402(b)(3).

This Court itself has refused to rewrite ERISA by inferring obligations and remedies Congress did not expressly provide. *See Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (holding that ERISA § 502(a)(3) does not authorize an action for money damages against a nonfiduciary who allegedly participated in the plan fiduciaries' wrong); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147-48 (1985) (holding that ERISA

§ 409(a) does not authorize an action by a plan participant for extra-contractual damages). The decision below, however, does just that. It creates a draconian remedy for noncompliance with § 402(b)(3)—automatic invalidation of plan amendments—nowhere found in the statute.

On its face, § 402(b)(3) does not require this remedy. The statute addresses neither the validity of plan amendments nor an employer's right to amend; it sets forth only a disclosure content requirement. Nor does effective enforcement of § 402(b)(3) require the automatic invalidation of plan amendments. A participant or the Secretary of Labor, for example, can sue under § 502(a)(3) or § 502(a)(5) for injunctive relief compelling a plan sponsor to set forth a procedure for amendment in the plan documents. 29 U.S.C. §§ 1132(a)(3), 1132(a)(5). Thus, ERISA expressly provides equitable remedies to correct the deficiency—the absence of an amendment procedure—without interfering with the administration of the plan or unduly burdening the plan sponsor.

Following the plain language of the statute, two Courts of Appeals have held that the validity of an amendment does not depend on the plan's compliance with § 402(b)(3). In *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990), the Court of Appeals for the Sixth Circuit upheld an amendment to a severance benefit plan that, since it previously had been unwritten, contained no amendment provision at all. The court found nothing in § 402(b)(3) requiring that the amendment be automatically invalidated:

> We do not believe . . . that Congress intended that any plan failing to comply with section 1102(b) [ERISA § 402(b)] would, for that reason alone, become unamendable. Plaintiffs have failed to show any detrimental reliance based on the defendant's failure to comply with section 1102(b), and, under these circumstances, we decline to impose the substantive remedy of prohibiting

> plan amendment in response to defendant's procedural violations.

905 F.2d at 949. *See, e.g., Govoni v. Bricklayers, Masons & Plasterers*, 732 F.2d 250, 252-53 (1st Cir. 1984) (per Breyer, J.) (holding that a plaintiff seeking relief for a disclosure violation under ERISA "must show some significant reliance upon, or possible prejudice flowing from," the violation).[13]

In *Biggers v. Wittek Industries, Inc.*, 4 F.3d 291 (4th Cir. 1993), the issue arose again in the context of a severance benefit plan that contained no amendment provision and, therefore, failed to comply with § 402(b)(3). The Court of Appeals for the Fourth Circuit agreed with the conclusion in *Adams* that the validity of an amendment does not depend on compliance with § 402(b)(3). 4 F.3d at 295. As did this Court in *Firestone Tire & Rubber Corp. v. Bruch*, 489 U.S. 101, 110-11 (1989), the Court then looked to analogous trust principles for guidance:

> A situation much like the one before us occurs in trust law when a settlor reserves the power to modify or revoke a trust, but fails to specify a method for implementing changes. If such power is reserved, then the settlor may exercise the power in any manner that "sufficiently manifests his intention to modify the trust."

4 F.3d at 295, quoting *Restatement, Second, of Trusts* § 331, comment c. *See also* G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 993 at pp. 233-39 (2d rev. ed. 1983); W. Fratcher, *Scott on Trusts* § 331 at pp. 378-81 (4th ed. 1989).

Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan, 947 F.2d 246 (7th Cir. 1991), cited by the court below (Pet. App. 10-11), comports with *Biggers* and *Adams*. The

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[13] *Accord, e.g., Lewandowski v. Occidental Chemical Corp.*, 986 F.2d 1006, 1008-10 (6th Cir. 1993); *Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743-44 (7th Cir. 1991); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1167-70 (3d Cir. 1990); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353-54 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985).

Seventh Circuit there invalidated a putative amendment, not set forth in the plan documents, that conflicted with an amendment procedure expressly set forth in the plan as a "limitation on amendments." 947 F.2d at 254-55. As in *Biggers*, trust principles supplied the rule:

> If the settlor reserves a power to modify the trust only in a particular manner or under particular circumstances, he can modify the trust only in that manner or under those circumstances.

947 F.2d at 254, quoting *Restatement, Second, of Trusts* § 331, comment d. Thus, the court never suggested that a failure to comply with § 402(b)(3) prohibits plan amendments. To the contrary, the court upheld another amendment despite an apparent violation of § 402(b)(3): After noting that the plan before it did not provide an amendment procedure for certain types of amendments, the court held that such an amendment was valid. Again, the Seventh Circuit determined the validity of the amendment by looking to whether it conflicted with the plan documents, not to whether the plan complied with § 402(b)(3). *See Murphy v. Keystone Steel & Wire Co.*, 850 F. Supp. 1367, 1381 (C.D. Ill. 1994) (concluding that the Seventh Circuit would reject *Schoonejongen* and follow *Biggers* and *Adams*, and upholding an amendment despite the absence of an amendment procedure), *appeal pending*, No. 94-2292 (7th Cir.) *See also* O'Brien & L. Meyer, *supra* p. 12 n.11, §§ 10.04 [2][b] and [c] at pp. 10-23 to 10-30 (concluding that *Biggers*, *Adams*, and *Murphy* follow "a more reasonable approach to § 402(b)(3)" than does the Third Circuit's decision here).

The purpose of § 402(b)(3) confirms that the statute does not require striking an amendment incorporated in the plan documents. This section complements ERISA § 402(a)(1), which provides that "[e]very employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). Although no legislative history addresses the purpose of § 402(b)(3) directly, that purpose is

inseparable from the function of the "written instrument" requirement: "that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." H.R. Conf. Rep. No. 1280, 93d Cong. 2d Sess. 297 (1974), *reprinted in* 3 Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of ERISA 4518, 4564 (Comm. Print 1976) (hereinafter "Legislative History"), and 1974 U.S. Code Cong. & Admin. News 5038, 5077-78.

Section 402(b)(3) potentially contributes to this end by promoting the identification of amendments not yet incorporated in the plan documents, specifically, by identifying the source of any such amendments. *See, e.g., Huber v. Casablanca Industries, Inc., supra*, 916 F.2d at 106 (upholding the enforcement of an amendment made by resolution of the plan's board of trustees but not added to the plan documents). This potential role of § 402(b)(3) is apparent from what otherwise would be a gap in ERISA's written instrument and disclosure requirements. ERISA allows substantial time lags between the adoption of amendments and their dissemination and incorporation in plan documents. A "material modification" need not be filed with the Secretary of Labor until 60 days after it is made, and a summary description of the modification need not be sent to participants until 210 days after the end of the plan year in which it is made. ERISA §§ 102(a)(1), 102(a)(2), 104(a)(1)(D), 104(b)(1), 29 U.S.C. §§ 1022(a)(1), 1022(a)(2), 1024(a)(1)(D), 1024(b)(1). Even then, neither the plan description nor the summary plan description need be revised to reflect the amendment; ERISA permits up to five years for that. ERISA §§ 104(a)(1)(B), 104(b)(1), 29 U.S.C. §§ 1024(a)(1)(B), 1024(b)(1). This was something new under ERISA. Its predecessor, the Welfare and Pension Plans Disclosure Act, required that plan amendments be published and included in the plan description "upon their effective date." Pub. L. No. 85-836, §§ 6(b), 8(a)(2), 72 Stat. 997 (1958), *reprinted in* 1958 U.S. Code Cong. & Admin. News 1172, 1175-76, 1178, *repealed by*

29 U.S.C. § 1031(a)(1). Section 402(b)(3) can best be understood as a corollary to this innovation.[14]

Thus, § 402(b)(3) is relevant only to amendments that have been adopted but not yet included in the plan documents. Once amendments are incorporated in the plan documents, the role of § 402(b)(3) is completed. There is no longer any need to look to a source identified in the plan amendment procedure to find out whether the plan terms as set forth in the plan documents have been changed. A participant may ascertain the plan terms, as amended, by looking at the plan documents. Indeed, revising the plan description—as Curtiss-Wright did here—is a prescribed method of informing both participants

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[14] The House and Senate versions of H.R. 2, the bill leading to ERISA, similarly provided that "[a]ll amendments to the plan shall be included in the [plan] description on or after the effective date of such amendments." H.R. 2 (as passed in House), 93d Cong., 2d Sess. § 103(b), *reprinted in* 3 Legislative History 3898, 3921; H.R. 2 (as passed in Senate), 93d Cong., 2d Sess. § 502(m), *reprinted in* 3 Legislative History 3599, 3752.

Like the WPPDA, the House and Senate versions of H.R. 2 would not have required plans to contain procedures for amendment or for identifying the person with amendment authority. The House bill did provide, in conjunction with requiring that a plan be in writing, that the plan designate an administrator who would have the authority to make certain amendments. H.R. 2 (as passed in House), 93d Cong., 2d Sess. § 111(a)(1), *reprinted in* 3 Legislative History 3898, 3947-48. The bill also provided, however, that absent such a designation, the employer would be considered the administrator for purposes of § 111. *Id.*, § 3(16), *reprinted in* 3 Legislative History 3898, 3907-08.

The suggestion that plans set forth procedures for amendment and identifying persons with amendment authority first appears in a staff report to the House and Senate conferees on the different versions of H.R. 2. *See* Summary of Differences between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform, Part III, Fiduciary and Enforcement, at p. 12 (June 12, 1974), *reprinted in* 3 Legislative History 5249, 5262. Neither the staff report nor the subsequent conference report, H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 297 (1974), *reprinted in* 3 Legislative History 4518, 4564 and 1974 U.S. Code Cong. & Admin. News 5038, 5078, explains the reason for this provision.

and the Secretary of Labor that the plan has been amended. *See* 29 C.F.R. §§ 2520.104a-4(b)(2) and 2520.104b-3(b). *See also Alday v. Container Corp. of America*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) ("The SPD is the statutorily established means of informing participants of the terms of the plan").

The Court of Appeals below identified a different purpose for § 402(b)(3): "that employees understand how their rights may be modified in the future." (Pet. App. 9 n.4). This cannot be reconciled with what Congress did. If Congress had been concerned with ensuring that employees know how their rights could be changed in the future, it logically would have required that plans contain procedures for plan termination as well as amendment; after all, a plan termination can modify rights to an even greater extent than a plan amendment. Congress imposed no such requirement.[15] The requirement that plans set forth procedures for amendment but not termination makes sense only if the purpose was to address a concern unique to plan amendments. That unique concern is that participants be able to ascertain the current terms of the plan on an ongoing basis. Section 402(b)(3) addresses that concern by enabling participants to identify amendments not yet incorporated in the plan documents.

The remedy created by the Third Circuit for a violation of § 402(b)(3) thus finds no basis in either the text or the purpose of the statute. If it is ever appropriate to fashion a remedy for a violation of § 402(b)(3) that ERISA does not

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[15] As part of Title IV, which addresses the insurance of certain pension benefits by the Pension Benefit Guaranty Corporation, ERISA requires only that terminations of pension plans subject to Title IV comply with certain procedures set forth in the statute. *See, e.g.*, ERISA §§ 4041-48, 29 U.S.C. §§ 1341-48. ERISA does not otherwise address the termination of either pension or welfare benefit plans. While the Third Circuit construed ERISA § 104(b)(1), 29 U.S.C. § 1024(b)(1), to require "notice of plan termination" for all plans, *see* p. 6, *supra*, the statute sets forth no such requirement.

expressly provide, that remedy must be tailored to the statute's purposes. When a sponsor goes beyond the minimum demands of Title I of ERISA and promulgates an amendment by revising the plan documents distributed to participants, there is no gap between the amendment's adoption and its incorporation in the plan documents. The goal of ensuring that participants may determine their rights by examining the plan documents is fulfilled without reference to § 402(b)(3). As a result, whether or not the plan complies with § 402(b)(3) should not affect the validity of the amendment.

B. Striking a Plan Amendment for a Violation of § 402(b)(3) that Caused No Harm to Plan Participants Upsets the Balance between Regulation and Costs of Compliance under ERISA.

ERISA carefully balances the regulation of benefit plans and the costs of compliance. "There is a 'tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs.' " *Mertens v. Hewitt Associates*, *supra*, 508 U.S. at ___, 113 S.Ct. at 2072, 124 L.Ed.2d at 174 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981); bracketed material added by the Court). Congress was concerned lest excessive costs discourage employers from offering and maintaining benefit plans at all. *See*, *e.g.*, H.R. Rep. No. 533, 93d Cong., 2d Sess. 1-2 (1974), *reprinted in* 2 Legislative History 2348, 2348-49 and 1974 U.S. Code Cong. & Admin. News 4639, 4639-40 (Educ. and Labor Comm.); S. Rep. No. 383, 93d Cong., 2d Sess. 1 (1974), *reprinted in* 1 Legislative History 1069, 1069 and 1974 U.S. Code Cong. & Admin. News 4890, 4890 (Finance Comm.) *See also Alessi*, *supra*, 451 U.S. at 515.

This balance is fundamental both to ERISA's vesting requirements and its remedial scheme. For example, ERISA does not restrict the terminability of welfare benefits. *See Massachusetts v. Morash*, 490 U.S. 107, 119 (1989). Also, the statute circumscribes the remedies provided for noncompli-

ance with its regulatory provisions. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). Thus, this Court has refused to create liabilities that ERISA does not expressly impose. *See Mertens v. Hewitt Associates*, *supra*; *Massachusetts Mut. Life Ins. Co. v. Russell*, *supra*. The same balance underlies holdings that procedural violations of ERISA do not give rise to substantive relief affecting benefit entitlements, at least not in the absence of specific harm. *See*, *e.g.*, *Govoni v. Bricklayers, Masons & Plasterers*, *supra*, 732 F.2d at 252, and other cases cited at p. 16 n.13, *supra*.

This case presents a stark example of how the statutory balance may be upset by judicial intervention. The only violation found below was that Curtiss-Wright's plan provided for amendment by "the Company" instead of by specified individuals and did not have a sufficient amendment procedure. No participant was less informed of the possibility of amendment because of the violation found. To the contrary, the plan clearly set forth that it could be amended by Curtiss-Wright at any time. Nor was any participant less informed of the specific amendment at issue once it was made.[16] Indeed, the amendment was promulgated in a way that ensured disclosure: It was incorporated in a revised plan document available and distributed to participants. Nor was any participant less certain of the amendment's authority. From the perspective of participants reviewing the revised plan document issued by Curtiss-Wright, the revisions incorporated in that document could only have been perceived as made "by the Company" as plan sponsor.

Had there been compliance with the Third Circuit's construction of § 402(b)(3) in this case, plaintiffs would not have been better off at all. Under the Third Circuit's view, § 402(b)(3) would have been satisfied if Curtiss-Wright's plan

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[16] *Compare Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, *supra*, 947 F.2d at 255, where the Seventh Circuit invalidated an amendment that had not been incorporated in a plan document and of which the participants "appear[ed] not even to have received notice."

expressly had provided for amendment, for example, by the revision of the plan document by one or more specifically designated employees of the Company. But the end result indisputably would have been the same: The plan would have been amended by the revision of the plan document, the plan participants would have had notice of the amendment, and benefits subsequently would have terminated based on that amendment.

As a result, the liability imposed on Curtiss-Wright bears no relation to the violation found. The decision below holds the Company liable for $2,681,086 for terminating nonvested benefits. But plaintiffs' loss of those benefits did not flow from any violation of § 402(b)(3). To the contrary, the Third Circuit acknowledged that Curtiss-Wright always had the right to terminate plaintiffs' welfare benefits, which was expressly reserved in the plan, and that its termination of those benefits would have been upheld but for the violation found. (Pet. App. 14-15). No one has identified any harm to any plan participant from the plan's failure to specify a "person" other than "the Company" to amend the plan or otherwise to provide a more detailed amendment procedure.

For employee benefit plans in general, the Third Circuit's ruling thus has precisely the effect ERISA was intended to avoid. Employers are faced not only with the uncertainty of whether or not their plans comply with § 402(b)(3)—a distinction the court below holds to depend on differences as slight as that between a provision for amendment "by the Trustees" and for amendment "by the Company"[17]—but with the threat of immense liability for noncompliance. This possibility provides a substantial disincentive against creating and maintaining employee benefit plans.

A substantive remedy might be appropriate if a violation of § 402(b)(3) were to cause substantive harm to plan partici-

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[17] Pet. App. 8, distinguishing *Huber v. Casablanca Industries, Inc.*, *supra*.

pants. *See Biggers v. Wittek Industries, Inc.*, *supra*, 4 F.3d at 296 n.1; *Adams v. Avondale Industries, Inc.*, *supra*, 905 F.2d at 949. That might occur where, because there is no amendment procedure, a participant were to have neither actual nor constructive notice that a plan has been amended and were to rely to his detriment on outdated plan terms—for example, by believing that he has continued insurance coverage when he does not. That is not this case. The general rule laid down by the Third Circuit fails to correlate the remedy and the harm: In this case, there was no harm flowing from the violation found. Curtiss-Wright respectfully submits that, by elevating procedure over substance, the decision below upsets a critical balance underlying ERISA.

C. Striking an Amendment Set Forth in a Plan Document Erodes the Integrity of the Plan Documents.

As noted, § 402(b)(3) and the "written instrument" requirement of § 402(a)(1) serve a common purpose: to ensure that "every employee may, by examining the plan documents, determine exactly what his rights and obligations are under the plan." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 297 (1974), *reprinted in* 3 Legislative History 4518, 4564, and 1974 U.S. Code Cong. & Admin. News 5038, 5077-78. This common purpose reflects a compelling policy under ERISA. Thus, courts have held that the plan terms as set forth in the plan documents cannot be modified, invalidated, or otherwise disregarded based on ERISA reporting and disclosure violations. *See* cases cited at p. 16 & n.13, *supra*. Further, courts have held that the plan terms generally cannot be modified by informal communications. *See, e.g., Huber v. Casablanca Industries, Inc.*, *supra*, 916 F.2d at 106; *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988); *Nachwalter v. Christie*, 805 F.2d 956, 959-61 (11th Cir. 1986); *but see Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990).

The court below recognized this fundamental policy: "[T]he participants are entitled to rely upon the plan document as defining the benefits currently being provided." (Pet. App. 10). It further observed that § 402(b)(3) "provides certainty and protects participants against frustration of their legitimate expectations" by ensuring "that employees understand how their rights may be modified in the future." (Pet. App. 9 n.4, 10).

By striking an amendment set forth in the formal plan documents, however, the Third Circuit's decision takes away more certainty than it provides. Section 402(b)(3) promotes the clear identification of what statements are intended to amend the terms of an employee benefit plan. That purpose is fulfilled, however, once an amendment is incorporated as a plan term in the plan documents. *See* pp. 17-20, *supra*. By contrast, the potential invalidation of amendments incorporated in plan documents means that plan documents are no longer dispositive of plan terms. Participants cannot rely on the current plan documents because any variations from prior plan documents would have to be evaluated by reference to the manner by which the changes were made—a matter not reflected in the plan documents and often beyond an employee's ability to discover. A participant's dilemma is worsened because, once incorporated in the plan documents, an amendment is indistinguishable from other plan terms. The particular certainty the decision below seeks to ensure—participants' knowing precisely the procedure for modifying their rights in the future—provides little benefit if participants cannot rely on the current plan documents to ascertain the present plan terms.

The theory of the court below that its remedy "enforce[s] the plan as written" rather than alters the plan terms is not correct. (Pet. App. 10). The court reasoned that "[u]nless and until the written plan is altered in a manner, and by a person or persons, authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the orig-

inal plan." (*Id.*) The judgment affirmed below, however, does not enforce the terms of the plan as it was originally established—whether that would be when Curtiss-Wright first provided health benefits to its employees, when in 1966 it first provided health benefits to retired employees, or when in 1976 Curtiss-Wright established the plan instruments under ERISA. Instead, the plan terms purportedly enforced by the courts below are those set forth in the 1983 plan document, with the sole exception of the termination clause at issue. (Pet. App. 38). The plan terms as stated in that plan document vary in many particulars from those stated in previous documents. To apply the Third Circuit's reasoning consistently, each provision in the 1983 plan document would have to be compared with prior provisions; if it varies from those provisions, then its validity would have to be evaluated based on how the change was made. Indeed, if the decision below stands, all plan terms added by amendment are potentially vulnerable to being stricken judicially.

The Third Circuit attempts to confine its holding to amendments "advantageous to the sponsor's interest." (Pet. App. 11 n.5). This also fails to avoid the underlying problem, for at least two reasons. First, not all plan amendments may be easily categorized as advantageous to either the sponsor's or the participants' interests. Even an amendment terminating or limiting benefits for certain participants, such as the amendment at issue here, advantages other participants if it contributes to the continuation of the plan as a whole. Other amendments—such as a change in health insurance carriers that is accompanied by an increase in both maximum coverage amounts and deductibles—also defy categorization. Second, the integrity of the plan documents cannot depend on whether terms favor the sponsor or the participants. Participants are not the only ones entitled to rely on the plan documents. The plan sponsor is entitled to rely on plan documents

as fixing the extent of its obligations;[18] plan administrators and other fiduciaries are required to rely on the plan documents in fulfilling their responsibilities. Parties can rely on the current plan documents only if the terms set forth in those documents, whether advantageous or not, are the plan terms.[19]

The general rule announced below is too broad because it invalidates terms set forth in the plan documents. The statutory purpose is better served by the rule trust law provides: When the right to amend is reserved but no procedure for amendment specified, the validity of a putative amendment depends on whether there was "a clear manifestation of an intent to alter the policy or plan." *Biggers v. Wittek Industries, Inc.*, 4 F.3d at 295-96. From any perspective, and particularly that of a plan participant, there is no clearer manifestation of a plan sponsor's intent to amend a plan than its revision of the plan documents. Because Curtiss-Wright amended its welfare benefits plan by revision of the plan documents and pursuant to an express reservation of the right to amend, there was no basis to invalidate the amendment.

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[18] As are the stockholders, creditors, and other persons to whom a sponsor may be required to report its liabilities. *See, e.g.*, FAS 106.

[19] The Courts of Appeals have overwhelmingly acknowledged this by refusing to enforce informal, "extra-plan" communications allegedly modifying benefits from those provided under the plan documents—whether to increase or decrease benefit entitlements. *See* cases cited at p. 24, *supra*.

CONCLUSION

The judgment of the Court of Appeals should be reversed to the extent that it holds Curtiss-Wright liable for the termination of plaintiffs' employee welfare benefits.

Respectfully submitted,

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APPENDIX A

STATUTORY PROVISIONS INVOLVED

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

SUBCHAPTER I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

SUBTITLE A—GENERAL PROVISIONS

§ 3, 29 U.S.C. § 1002. Definitions.

For purposes of this subchapter:

* * *

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

* * *

SUBTITLE B—REGULATORY PROVISIONS

Part 1—Reporting and Disclosure

§ 101, 29 U.S.C. § 1021. Duty of disclosure and reporting.

(a) Summary plan description and information to be furnished to participants and beneficiaries. The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) [29 U.S.C. § 1024(b)] to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 102(a)(1) [29 U.S.C. § 1022(a)(1)]; and

(2) the information described in sections 104(b)(3) and 105(a) and (c) [29 U.S.C. §§ 1024(b)(3), 1025(a) and (c)].

(b) Plan description, modifications and changes, and reports to be filed with Secretary of Labor. The administrator shall, in accordance with section 104(a) [29 U.S.C. § 1024(a)], file with the Secretary—

(1) the summary plan description described in section 102(a)(1) [29 U.S.C. § 1022(a)(1)];

(2) a plan description containing the matter required in section 102(b) [29 U.S.C. § 1022(b)];

(3) modifications and changes referred to in section 102(a)(2) [29 U.S.C. § 1022(a)(2)];

(4) the annual report containing the information required by section 103 [29 U.S.C. § 1023]; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

* * *

§ 102, 29 U.S.C. § 1022. Plan description and summary plan description.

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 U.S.C. § 1024(b)]. The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the

information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 U.S.C. § 1024(b)(1)].

(2) A plan description (containing the information required by subsection (b)) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1) [29 U.S.C. § 1024(a)(1)]. Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D) [29 U.S.C. § 1024(a)(1)(D)].

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 U.S.C. § 1133]).

* * *

§ 1024. Filing and furnishing of information.

(a) Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary. (1) The administrator of any employee benefit plan subject to his part shall file with Secretary—

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 102(a)(2) [29 U.S.C. § 1022(a)(2)] within 60 days after such modification or change is adopted or occurs, as the case may be.

The Secretary shall make copies of such plan descriptions, summary plan descriptions, and annual reports available for inspection in the public document room of the Department of Labor. The administrator shall also furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

* * *

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan. Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in section 102(a)(1) [29 U.S.C. § 1022(a)(1)]—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 102 [29 U.S.C. § 1022] which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 102 [29 U.S.C. § 1022] every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 102(a)(1) [29 U.S.C. § 1022(a)(1)], a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 103(b)(3) [29 U.S.C. § 1023(b)(3)(A), (B)] and such other material (including the percentage determined under section 103(d)(11) [29 U.S.C. § 1023(d)(11)]) as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

* * *

Part 4—Fiduciary Responsibility

§ 402, 29 U.S.C. § 1102, Establishment of Plan.

(a) Named Fiduciaries.

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

* * *

(b) Requisite features of plan.

Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

* * *

Part 5—Administration and Enforcement

§ 502, 29 U.S.C. § 1132. Civil Enforcement.

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to

enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of section 1025(c) of this title;

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions.

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of

such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Refusal to supply requested information; failure to comply with notice requirements; penalties.

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such par-

ticipant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation. The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction.

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have

exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties.

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions.

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury.

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty.

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such

transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General.

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor.

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries.

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an

amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

No. 93-1935

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Can an employer sponsor of a welfare plan that has disregarded the statutory mandate of ERISA § 402(b)(3), 29 U.S.C. 1102(b)(3) by failing to provide a procedure for accomplishing a plan amendment or to identify the persons with authority to amend the plan, informally add language purporting to clarify a Summary Plan Description and thereby deprive retired participants of lifetime health benefits under the plan?

Should an employer sponsor of a welfare plan that has implemented an unlawfully adopted amendment to the plan terminating lifetime health benefits to retired participants be required to disregard such amendment and to continue to provide those benefits to the participants until such time as the plan is properly amended?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1935

CURTISS-WRIGHT CORPORATION,

Petitioner,

—against—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

STATEMENT OF CASE

A. Factual Summary

Beginning in 1966, Curtiss-Wright Corporation ("the petitioner") maintained a plan providing for post-retirement health benefits for retirees from several facilities including its Wood-Ridge, New Jersey facility. As of November 1983, approximately 500 Wood-Ridge participants ("the respondents") were receiving health insurance benefits for themselves and their beneficiaries under that plan. Prior to 1983, no plan provision stated or implied that respondents' retiree

health coverage could be terminated in the event the Wood-Ridge facility closed.

In 1983, the relevant Curtiss-Wright plan documents were the constitution of Curtiss-Wright Employee Benefit Plan dated March 1, 1977, J.A. 34-40, and the 1983 Summary Plan Description, J.A. 43-56. The Constitution provides at Article 6 that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." J.A. 37.[1]

In 1983, as part of a routine redrafting of a Summary Plan Description ("SPD"), a new plan term, written by a draftsman whose identity was never firmly established,[2] was included in the SPD specifically calling for termination of retirees' health benefits if the facility at which the retiree had worked was closed. Petitioner's board of directors never approved or ratified this insertion into the SPD. Pet. App. 8a. There were no formal amendment procedures at all and petitioner failed to follow previously utilized informal procedures for plan amendment. Pet. App. 36a. In successive annual plan returns JA 41-42, 60-61, petitioner denied that any plan amendment had occurred in either 1982 or 1983.[3]

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[1] The Constitution further provides at Article 8(4) that "[i]n the event that any provision of the Plan shall be held invalid or illegal for any reason, such determination shall not affect the remaining provisions of the Plan adopted by the Company or any Trust under a Plan adopted by the Company, but the Plan shall be construed and enforced as if such invalid or illegal provision had never been included." J.A. 39

[2] Two of petitioners mid-level managers actually differed at trial over who had inserted the new plan term into the SPD. J.A. 69-70, 77-78. See note 4, *infra*.

[3] Every employee benefit plan is required to file a Form 5500 with the Internal Revenue Service each year. One of the specific inquiries in that return is whether the plan was amended in the year for which a report is filed. ERISA Section 104, 29 U.S.C Section 1024.

On November 30, 1983, Curtiss-Wright closed its Wood-Ridge facility and terminated the retiree health insurance for respondents. The health plan benefits to retirees from the other Curtiss-Wright facilities continued unchanged.

B. The District Court Decision

On October 4, 1990, after a six day trial, the district court found that the newly added SPD language "constituted an amendment of the plan, not a clarification of existing terms as defendant contends."[4] Pet. App. 36a. The court held that the language inserted into the SPD was not effective to amend the plan because of petitioner's failure to provide for an amendment procedure, as mandated by ERISA § 402(b)(3). *Ibid.* The district court considered the testimony of a single Curtiss-Wright manager that there might "have been an unwritten procedure for amending the plan involving the submission to a certain executive committee. . . ." However, it concluded that "even those procedures were not followed in the case of the 1983 amendatory language." Pet. App. 38a.

The court went on to describe as "completely unpersuasive petitioner's claim that "somehow or other a *de facto* compliance with those unpublished amendment procedures took place because of the membership of that committee and its knowledge of these events. . . ." *Id.*

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[4] The drafters of the SPD revision failed to recognize that the new plan language was in fact an amendment to the plan. Indeed, they steadfastly insisted that the new plan language was a mere "clarification" of the existing plan terms, J.A. 63, 70-71, 79, and therefore they were not concerned about adhering to any amendatory procedures before inserting this language into the SPD.

Petitioner continues to label the distinction between a "clarification" and an "amendment" as "theoretical" and "immaterial". Pet. Br. 14. Petitioner fails to understand that an amendment is a significant change in plan terms that cannot be adopted except through compliance with a stated procedure while a clarification can be accomplished through routine redrafting by minor functionaries.

The court therefore deemed the plan to be in effect without the amendment and held that respondents continued to be eligible for benefits. The district court declined to enter an injunction precluding petitioner from restating the plan to include a formal amendment procedure and from proceeding thereunder to effectuate the plan amendment it had unsuccessfully sought to apply to respondents in 1983. Pet. App. 40a. Petitioner in November 1990 through formal action of its board of directors amended its plan to effectively terminate respondents benefits.

C. The Third Circuit Decision

The Third Circuit handed down its initial ruling on December 28, 1993. On March 3, 1994, the Third Circuit vacated its December 28, 1993 opinion and filed a substitute opinion. Pet. App. 1a. On March 14, 1994, the court denied petitioner's petition for rehearing. Pet. App. 109a.

The March 3, 1994 decision rejected petitioner's arguments that its plan contained an amendment procedure complying with Section 402(b)(3) and that no substantive remedy was warranted if Section 402(b)(3) had been violated. The Third Circuit concluded that petitioner's plan amendment language was insufficient because "[a] simple reservation of a right to amend is not the same as a 'procedure for amending [the] plan'; nor does it provide a procedure 'identifying the persons who have authority to amend the plan.' " Pet. App. 7a-8a. The court went on to hold that petitioner's interpretation of Section 402 (b)(3) would render the statute meaningless.

The court rejected the argument that incorporation of new language into the SPD by the petitioner rendered moot any discussion of the means by which the alleged amendment had been adopted. The court held that a written incorporation of new plan terms into pre-existing plan documents and a clear intent to amend are necessary but not sufficient to accomplish an effective plan amendment. Compliance with published

amendment procedures is also required, in order to allow employees to understand not only their present benefits, but how their rights may be modified in the future. *Id.* at n.4.

Recognizing that ERISA's basic tenets require that a plan be established and maintained pursuant to a written instrument available on request to plan participants, the court held that "[u]nless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan." Pet. App. 10a. The Third Circuit concluded that a rule invalidating improperly adopted putative plan amendments was necessary to "assure the integrity" of plan documents. Pet. App. 11a.

The Third Circuit explicitly rejected petitioner's contention that the failure to provide and follow an amendment procedure was a "procedural" violation which did not create substantive rights. The court held that compliance with appropriate amendment procedures was a "far more fundamental" concern than a failure to comply with ERISA'S reporting or disclosure requirements, because the amendment procedures safeguard the basic integrity of the plan document. Pet. App. 10a.

The Third Circuit enunciated a rule that "best served" the Congressional scheme embodied in ERISA by allowing plan sponsors whose plans fail to satisfy Section 402(b)(3) to restate the plan "by formal action of those who possess the sponsor's final management authority" to include an amendment procedure. Pet. App. 11a.

A footnote to the majority opinion stated Judge Roth's concurring view that the phrase "by the Company" in the Curtiss-Wright plan provision reserving the right to amend the plan must, at a minimum, require that action be taken by petitioner's board of directors pursuant to the applicable state corporate law. In her view the "amendment in question here was ineffective because neither [Curtiss-Wright's] board nor

any other person or entity within [Curtiss-Wright] with the power to act on behalf of 'the Company' ratified it." Pet. App. 8a-9a n. 3.

D. The Petition for Certiorari

On September 26, 1994, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit was granted.

SUMMARY OF ARGUMENT

1. Since the district court held that petitioner made no effort to accomplish a valid plan amendment and since petitioner denied, until the district court's decision, that an amendment had even been attempted, the result below must be affirmed under any reasonable interpretation of Section 402(b)(3).

2. Section 402(b)(3) requires that every plan identify the person with the authority to amend the plan and the procedure to be utilized in accomplishing the amendment. Even if naming the "Company" in the bare reservation of rights language adopted by petitioner is deemed to satisfy the statutory requirement that the individual with the power to amend be identified, the second requirement that a procedure be set forth has not been met. The Third Circuit's finding that the reservation of rights language does not satisfy the requirements of Section 402(b)(3) follows the plain meaning of the statute.

3. Both Judge Roth and the Solicitor General suggest that, in some instances, an amendment procedure could be read into a plan by incorporating procedures in other plan documents or by incorporating by reference applicable statutory provisions. Were this Court to accept that approach, it would protect many plan amendments, although not the one attempted by petitioner, which was never intended to accom-

plish more than a language clarification and did not even follow the minimal, previously-utilized, informal amendment procedures.

4. A plan amendment adopted in violation of a specified amendment procedure is clearly invalid. Similarly, plan amendments adopted in violation of an incorporated or implied amendment procedure or in the absence of any amendment procedure are also invalid. It is appropriate to enforce the terms of a plan without giving effect to an invalid amendment, the relief granted by the Third Circuit. Otherwise, employers and plan sponsors who comply with the law by providing a procedure for amending their plans will be disadvantaged in that their burden will be heavier than that of sponsors who have not complied.

5. To justify a reversal of the result below the Court would have to accept petitioner's argument that because it would have terminated retiree health coverage in any event, requiring it to obey the law would be pointless. That cynical "no harm no foul" approach would effectively read Section 402(b)(3) out of ERISA. Furthermore, this interpretation rests on the erroneous assumption that petitioner's failure to include and follow a stated procedure for amending its plan did not harm respondents.

6. In fact, respondents suffered serious harm by the deprivation of their right to have this critical amendment terminating their lifetime retirement health care benefits made by a designated authority cognizant that a substantive change in plan terms and not a mere clarification was being made. Respondents were also deprived of a record of the amendment and were forced to spend seven years in litigation to prove an amendment had occurred. This exercise disadvantaged the court as well as respondents.

7. Congress did not intend that the common law of trusts govern all aspects of the operation of employee benefit plans when it enacted ERISA. The decision in *Biggers* v. *Whittek*

Industries, Inc., 4 F.3d 291 (4th Cir. 1993), should not be followed to the extent it advocates automatic application of common law trust principles to ERISA plans.

8. A requirement that plans comply with the plain language of the statute will not lead to the flood of litigation predicted by petitioner and the amici because plan amendments of the magnitude of the one at issue here are seldom attempted through casual redrafting rather than formal acts by the plan sponsor's highest authority.

ARGUMENT

I. PETITIONER'S AMENDMENT OF THE SPD WAS NOT EFFECTIVELY ADOPTED UNDER ANY REASONABLE INTERPRETATION OF SECTION 402 (b)(3)

Section 402(b)(3) commands that every employee benefit plan shall "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3). Petitioner's plan merely stated that "[t]he Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." J.A. 37. When petitioner altered the SPD to provide for the termination of retiree health insurance benefits upon the closure of the Wood-Ridge facility, it added a plan term that could only be included by lawful amendment. The question presented by this case is whether that amendment was properly adopted and therefore effective.

The court below presents two interpretive approaches to Section 402(b)(3). First, there is that of the Third Circuit opinion, which requires that an amendment procedure be found within the plan documents. Second, there is the interpretation urged by Judge Roth (and proposed in the Solicitor General's brief) which would permit an amendment procedure

to be imputed from outside the four corners of the plan by the application of state or federal law. In contrast, the position proffered by Petitioner is that a plan need not have or follow any amendment procedure at all.

It is submitted that this Court's analysis of these competing interpretations must consider four factors, three enunciated by the Third Circuit to support its statutory reading and one posited by petitioner and the amici. These are (1) the neutral principles of statutory construction and the plain language of the statute, (2) the statutory purpose of achieving certainty with respect to applicable plan terms, (3) the avoidance of the perverse result that plans which comply with the letter of the law are worse off than those which do not, and (4) the balancing of the interests of the participants protected by Section 402 (b)(3) against the costs of compliance to plan sponsors.

The Third Circuit held that neither petitioner's board of directors nor any other person or entity within Curtiss-Wright with the power to act on behalf of "the Company" ratified the 1983 amendment to the SPD. Pet. App. 8a. The district court found that neither formal nor informal procedures were followed in 1983 by petitioner in connection with the new plan terms. Pet. App. 38a. Respondents submit that ERISA contemplates a modicum of procedural formality before stripping retirees of the lifetime health benefits they had been promised.[5]

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[5] Petitioner disingenuously persists in its claim that an "unwritten practice" had been followed in this case because the amendment had been promulgated by the legal department and executive committee members. Pet. Br. 13. However, the record reflects that Richard A. DuBois, the sole witness on this point, testified that if the so-called informal executive committee had in fact accomplished a plan amendment, its decisions would have been reflected in meeting minutes or a memorandum, and that no such committee action ever occurred. J.A. 73-74. The testimony showed and the district court found that, not only was no formal amendment procedure followed by petitioner, but also that an unwritten procedure calling for review by a so-called executive committee was not followed.

The only interpretation of Section 402(b)(3) which would not result in the invalidation of petitioner's amendment would, by necessity, read the requirements of that section out of the statute by holding that a plan need not have an amendment procedure. Petitioner argues that the statute doesn't compel any particular procedure and that its general reservation of a right to amend is itself a procedure.[6] Petitioner's interpretation, if adopted by this Court, would effectively amend the statute in question to read "[e]very employee benefit plan shall state whether the sponsor reserves a power to amend". That could have been the language adopted by Congress—but it was not; Congress plainly chose to impose a heavier and a more specific burden upon plan sponsors.

A. The Third Circuit's Opinion is Supported by the Plain Language of the Statute and by Neutral Principles of Statutory Construction

Any analysis of Section 402(b)(3) should "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park'N Fly Inc.* v. *Dollar Park & Fly Inc.*, 469 U.S. 189, 194 (1985); *accord Connecticut National Bank* v. *Germain*, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992); *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990). The clarity and precision of Section 402(b)(3) casts onto petitioner the "exceptionally heavy burden of persuading [the Court] that Congress intended to limit" the statute's clear language. *Patterson* v. *Shumate*, 112 S.Ct. 2242, 2248, 119 L.Ed.2d 519

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[6] The Solicitor General makes a similar, but more limited argument in analogizing employee benefit plans to the United States Constitution and arguing that all the plan is meant to do is provide the framework upon which provisions, including an amendment process, are to be grafted. That analogy is misplaced since ERISA, in contrast to the Constitution, is a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guarantee Corp.*, 446 U.S. 359, 361, *reh'g denied*, 448 U.S. 908 (1980). The Constitution is also distinguishable in that it includes a very specific amendment procedure.

(1992), *quoting Union Bank* v. *Wolas*, 112 S.Ct. 527, 530, 116 L.Ed.2d 514 (1991).

The structure of Section 402 reflects a strong Congressional determination to achieve adherence to the requirements of Section 402(b)(3).[7] The hierarchy of priorities of Section 402 is shown by its division into Subsection 402(b) and 402(c), the plan features of the former being "requisite" and those of the latter being "optional". Section 402 (b) itself has differentiated priorities among its mandated features. For example, Section 402(b)(2) requires that a plan "describe" any procedure under the plan for allocating responsibility for certain acts among the trustees, thereby making plain that the existence of such a procedure is discretionary.[8] By contrast, the

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[7] ERISA's Congressional findings and declaration of policy at 29 U.S.C. 1001(a) provides that "it is desirable in the interests of employees and their beneficiaries . . . that disclosure be made *and safeguards be provided with respect to the establishment, operation, and administration of such plans.*" The declaration of policy further states that it is in the interests of employees and their beneficiaries *"that minimum standards be provided assuring the equitable character of such plans"*. The statute provides at 29 U.S.C. 1001(b) that "[i]t is hereby declared to be the policy of this Act to protect . . . the interests of participants . . . *by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans.*" It is clear that Congress regarded its standards for the administration of employee benefit plans to be central to the Act.

[8] Sections 402(b)(1) and (b)(3) have a similarly phrased requirement of a procedure, except that Section 402(b)(1)'s demand that a plan specify a procedure for establishing and carrying out a funding policy is applicable only to funded plans. D.O.L. Reg. 2509.75-5, 29 C.F.R. 2509.75-5 (FR-5) (ERISA Interpretive Bulletin 75-5). It is instructive however to consider the procedure that the U.S. Department of Labor (DOL) authorized in its 1975 regulations for compliance with 402(b)(1) to flesh out the procedural specificity that should be required to satisfy Section 402(b)(3). The DOL described an acceptable procedure under Section 402(b)(1) that "the plan's trustee shall, at a meeting duly called for the purpose, establish a funding policy and method which satisfies the requirements of . . . the Act and shall meet annually at a stated time of the year to review such funding policy and method." 29 C.F.R. 2509-75-5 (FR-4). It is very difficult to square this attention to procedural detail

language petitioner seeks to dilute is expressly designated a mandatory plan feature as no suggestion of discretion appears in the language of Section 402(b)(3).

Petitioner also contends that it adequately identified the "persons who have authority to amend the plan" by its reference to "the Company." ERISA defines the term "person" as including corporations and other entities that could be plan sponsors. 29 U.S.C. 1002(9). It is not, however, the identity of a particular person that Congress sought but a "procedure . . . for identifying the persons who have authority to amend the plan."[9] It is far more consistent with the thrust of the entire section to require that, for the benefit of participants, sponsors identify the level in the organization at which amendments can be effectively promulgated.[10]

B. The Third Circuit's Opinion Serves the Primary Purpose of Section 402(b)(3) by Assuring That Participants, Fiduciaries, Sponsors and Reviewing Courts Can Determine the Content of the Plan's Effective Written Instrument.

Petitioner acknowledges that Section 402(b)(3) requires that each plan amendment be set forth in a written instrument but asks the Court to limit the purport of the statute to "promoting the identification of amendments not yet incorporated in the plan documents". Pet. Br. 17-18. This limited view rests entirely on petitioner's notion that an amendment's

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for implementing a parallel statutory requirement of the statute with the Solicitor General's view in this case.

[9] In Judge Roth's view, that identification can be imputed by reference to the law of the state of incorporation of the Company. See Point II, *infra*.

[10] See *Musto* v. *American General Corp.*, 861 F.2d 897, 902 (6th Cir. 1988) *cert. den.*, 490 U.S. 1020 (1989), in which the ERISA plan provided that "[o]nly the President, a Vice President, the Secretary or an Assistant Secretary has power on behalf of the Company to make or modify this contract of insurance."

mode of adoption becomes irrelevant once the new language appears in a plan document. This contention—and the reasoning flowing from it—overlook the definitive role of Section 402(b)(3) in carrying out ERISA's requirement that each benefit plan be maintained pursuant to a written instrument. See Section 402(a)(1), 29 U.S.C. § 1102(a)(1). Fiduciaries are required to discharge their "duties with respect to a plan solely in the interests of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this Title or Title IV." 29 U.S.C. § 1104(a)(1)(D). Fiduciaries are required to adhere to plan documents only insofar as such documents are consistent with Title I; they must be able to ascertain whether putative amendments are part of the "documents and instruments governing the plan" and, if so, when such amendments became effective. Obviously documents containing newly added plan terms that have not been adopted in accordance with Section 402(b)(3) can not be deemed "consistent" with Title I.

The Third Circuit held that Section 402(b)(3) was enacted to permit all interested parties—participants, plan sponsors and reviewing courts—to know how a plan may be altered and who may make such alterations. As the Third Circuit observed, "[o]nly if [participants] know this information will they be able to determine with certainty at any given time exactly what the plan provides." Pet. App. 8a. Employee benefit plans are a multi-billion dollar component of the United States economy which provide important benefits to millions of employees. Congress was presumably concerned that an identifiable procedure exist for determining precisely when and by whom any alterations in those plans had been or could be accomplished.[11]

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[11] The Solicitor General argues that Congress was concerned only that each plan be able to effectuate amendments. If that were Congress' only concern, it would have adopted unchanged the original version of H.R. 2 which deemed Plan Administrators to be able to amend plans without reference to any procedure. See, note 21, *infra*.

The decision below is an important aid for reviewing courts in ascertaining when, under what circumstances and by whose authority critical plan terms have been changed. It is needlessly difficult to review these matters in the absence of an identified procedure which properly frames and dates disputed terms.

C. The Third Circuit's Opinion Avoids an Absurd Result

The interpretation urged by petitioner leads to the absurd result that plan sponsors who comply with the plain language of Section 402(b)(3) would be worse off than those who ignore it. Every court which has considered the matter has concluded that a plan sponsor who adopts amendment procedures is required to follow them to achieve an effective amendment. *See Hozier* v. *Midwest Fastener, Inc.*, 908 F.2d 1155 (3d Cir. 1990); *Frank* v. *Colt Industries, Inc.*, 910 F.2d 90 (3rd Cir. 1990), *reh'g denied*; *Albedyell* v. *Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 255 (7th Cir. 1991). Petitioner's interpretation of the statute would allow plan sponsors, who do no more than reserve the right to amend, to effectuate a plan amendment without following a plan procedure merely by including new language in a summary plan description. On the other hand, plan sponsors who comply with the statute by adopting amendment procedures are required to abide by those procedures. Congress, of course, did not intend to place those who violate Section 402(b)(3) in a better position than those who comply.

D. Preservation of the Status Quo Cannot Justify Ignoring the Clear Statutory Requirements Upheld by the Third Circuit Opinion

Petitioner makes much of the similarity between a bare bones reservation of a right to amend in its plan document and the general language included in an Internal Revenue Service ("IRS") master and prototype plan publicized by a commercial pension service. *2 Pension Coordinator* para. 13,

181 at 13, 276 R - 124 (RIA 1994). There is absolutely no suggestion that by creating this sample plan, the IRS intended, or was empowered to issue an authoritative interpretation of Section 402(b)(3). Respondents join the Solicitor General's observation that the prototype language is owed no heightened deference as a legal matter because the IRS has no interpretative or enforcement authority with respect to matters arising under Section 402 of the Act. Prior to the submission of the Solicitor General's brief, the cognizant agency, the Department of Labor, had not issued any interpretative guidance respecting 402(b)(3). An agency view first precisely expressed in a brief to this Court should not be accorded the deference due a settled and long-standing administrative interpretation.[12] *See Estate of Cawort* v. *Nicklos Drilling*, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992); *John Hancock Mutual Life Insurance Co.* v. *Harris Trust & Savings Bank*, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993).

The petitioner and amici rely less upon the authoritative effect of the IRS prototype language than on the *in terrorem* argument that ERISA plans throughout the nation that have adopted such language will be disrupted if the decision of the Court below were upheld. Despite the fears expressed by petitioner and its amici that plans have relied upon general reservation of rights language to accomplish plan amendments through casual redrafting of plan documents, the case law suggests that ERISA plans are routinely amended by actions of corporate boards of directors.[13] See, Pension and Profit

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[12] In this respect the Department of Labor's view in 1975, virtually at the time of the adoption of ERISA, on the procedural detail necessary to satisfy Section 402(b)(1) is far more probative of the statute's intent than the pallid version offered today by the Solicitor General. See note 8, *supra*

[13] *See, Elmore* v. *Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994); *Law* v. *Ernst & Young*, 956 F.2d 364, n.9 (1st Cir. 1992); *McDonald* v. *Pan American World Airways, Inc.*, 859 F.2d 742 (9th Cir. 1988) (dissenting opinion); *In re Graham*, 726 F.2d 1268 (8th Cir. 1984); *Kuper* v. *Quantum Chemical Corp.*, 852 F.Supp. 1389 (S.D. Ohio 1994); *Farr*

Sharing 2d, Vol. 5, Sec. ERISA 402-4.01 (Maxwell MacMillan, 1991), a widely accepted general reference work, which states that "[m]any plans reserve the right to amend to the sponsor, to be exercised by its board of directors or authorized corporate officers. Persons authorized to amend the plan should be identified in the plan document by name or by office."

Congress considered the cost and burden of compliance with its plain language when it adopted Section 402(b)(3).[14] Petitioner suggests a new and extraordinary principle of statutory interpretation that could eviscerate ERISA and affect a wide range of statutes, i.e., that employers subject to ERISA can free themselves of unwanted administrative burden by determined non-compliance.[15] If that were the case, why

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v. *U.S. West, Inc.*, 815 F. Supp. 1364 (D. Or. 1992); *Pane* v. *RCA*, 868 F.2d 631, 634 (3rd Cir. 1989); *Nachwalter* v. *Christie*, 611 F.Supp. 655, 663 (S.D. Fla, 1985), *aff'd*, 805 F.2d 956 (11th Cir. 1986). Indeed, petitioner included such a detailed procedure in its Trust Agreement, which provides, at Article XII that "the Company reserves the right at any time and from time to time by action of its Board of Directors to amend, in whole or in part any or all of the provisions of this Agreement . . .". J.A. 30.

[14] The 1974 House Report accompanying HR 2 concluded that "the relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases have been minimized. Additionally, all of the provisions in the Act have been analyzed on the base of their projected costs in relation to the anticipated benefit to the employee participant." House Rep. 93-533, 1974 U.S.C.C.A. 4639. Although this particular language appears to predate the specific adoption of Section 402(b)(3), the observation that Congress conducted a cost/benefit analysis before adopting these plan design requirements continues to be true.

[15] The Fifth Circuit made a similar point in ruling that ambiguities in an SPD must be resolved against the drafter. In *Hansen* v. *Continental Insurance Co.*, 940 F.2d 971, 981-982 (5th Cir. 1991) the court held that "any burden of uncertainty created by careless or inaccurate drafting of the summary must be placed on those who do the drafting, and who are most able to bear that burden and not on the individual employee

would any plan sponsor adhere to ERISA's other mandated plan design features? Why place plan assets in a trust or create a written plan?

This Court has previously rejected arguments by litigants and the Solicitor General that an alleged potential for disruption is a dispositive factor in statutory interpretation and it should reject that argument here. *See e.g. John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 114 S.Ct. 517, 126 L.Ed.2d 524 (1993). In any event, if relief from the enforcement of Section 402(b)(3) as written is beneficial or advisable, it should be provided by Congress and not the Court.[16]

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who is powerless to affect the drafting of the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document." The court concluded by observing that "[a]ccuracy is not a lot to ask . . . especially not a lot to ask in return for the protection afforded by ERISA's preemption of state law causes of action" Id. Respondents contend any burden of observing statutory procedures in amending the plan should be placed on the plan sponsor who has a unilateral ability to comply and is best able to bear any burden arising from its failure to adhere to the statute.

[16] Should an affirmance of the Third Circuit actually result in the torrent of litigation predicted by petitioner and amici, Congress could enact a new jurisdictional rule to deal with the situation. See, e.g., Portal to Portal Act of 1947, 61 Stat 84 as amended, 29 U.S.C. §§ 251-264. *Landsgraf* v. *USI Film Products*, 511 U.S. ___, 128 L.Ed.2d 229, 266 (1994) (Scalia, J., concurring); *Pension Benefit Guaranty Corp.* v. *R. A. Gray & Co.*, 467 U.S. 717 (1984); *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952); Hochman, "The Supreme Court and the Constitutionality of Retroactive Legislation", 73 Harv. L. Rev. 692 (1960).

II. THE INTERPRETATION OF SECTION 402(b)(3) OF JUDGE ROTH AND THE SOLICITOR GENERAL RECOGNIZES AN IMPUTED AMENDMENT PROCEDURE WHICH PETITIONER DID NOT SATISFY

In the opinion of the Third Circuit it is noted that Judge Roth would rely upon the application of Delaware Corporation Law to determine the procedure that Curtiss-Wright had to follow in order to amend the plan:

> Even if we were willing to equate "by the Company" with "by the board of directors," the record here does not indicate that the 1983 amendment was adopted by CW's board. While Judge Roth agrees with our conclusion that the amendment to the plan was ineffective, she does not agree with our reasoning on this point. Instead, Judge Roth believes that action taken by "the Company" means action taken by the board of directors or whomever of the company has the authority to take such action under the corporation law of the state of incorporation of the company in question. As CW is a Delaware corporation, Judge Roth would consider action by "the Company" to be action by the board of directors pursuant to 8 Del. C. § 141(a). . . . Thus the amendment in question here was ineffective because neither CW's board nor any other person or entity within CW with the power to act on behalf of "the Company" ratified it. Pet. App. 8a-9a, n.3.

The Solicitor General's brief advocates a similar approach.

The position advocated by the Solicitor General and taken by Judge Roth would establish a default rule deeming that a reference to the "company" means action by its highest decision maker—in the case of petitioner, its corporate board of directors. Where a plan fails to comply with the plain meaning of Section 402(b)(3) because it does not provide an amendment procedure, a statutory violation will be avoided if an amendment procedure can be incorporated from applicable

state or federal law. Judge Roth's approach is in accord with the decision in *Huber* v. *Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990), *cert. dismissed*, 113 S. Ct. 1070 (1993), to the extent that the *Huber* amendment procedure was incorporated by reference to the provisions of the Labor Management Relations Act, rather than by reference to accompanying trust documents.

Nevertheless, Judge Roth's approach cannot be reconciled with the statute's plain language as the imputed amendment procedure is not to be found within any plan document. It would require a sophisticated reader of plan documents to recognize that an amendment procedure could be imported from a state or federal statute and, in that sense, the plan documents could not be read with the certainty that would be provided under the Third Circuit interpretation.

Of course, Judge Roth's approach has many of the Third Circuit decision's analytical strengths. By incorporating or implying a lawfully mandated amendment procedure for plans that neglected to provide one for themselves, those who conscientiously comply with the law will not be thereby disadvantaged since the non-complying plan sponsors will nevertheless be required to follow a legally mandated procedure. Indeed, plan sponsors who comply with ERISA may be advantaged since they will have designed their own amendment processes which they consider less burdensome than those otherwise imposed by law.

Judge Roth's approach also defuses petitioner's arguments about the dangers of disturbing the status quo by undermining countless plan amendments. Many plan sponsors who may have chosen reservation of rights language similar to petitioner's will have amended their plans through actions of their corporate boards of directors or other legally mandated authority. Adopting Judge Roth's view would mitigate the litigation explosion predicted by petitioner and amici while still

remaining true to the statute's essential purpose of insuring certainty in the ascertainment of plan terms.

Should this Court choose the approach enunciated by Judge Roth and supported by the Solicitor General, the decision below must be affirmed, since the district court found that petitioner's board of directors neither adopted nor ratified the amendment in question.

III: THE THIRD CIRCUIT PROPERLY ENFORCED PETITIONER'S PLAN WITHOUT THE PLAN AMENDMENT THAT FAILED TO COMPLY WITH SECTION 402(b)(3)

The appropriate remedy for failure to properly amend a plan is to require the plan to continue as it was prior to the failed amendment. The Curtiss-Wright Plan Constitution includes a savings clause (Article 8, Section 4) providing that if any plan term was legally ineffective, the plan would be construed without reference to that term. J.A. 39. Accordingly, enforcing the plan as written and disregarding a legally ineffective amendment was exactly what the plan sponsor intended.

As the Third Circuit noted:

> There is something at stake here far more fundamental than a failure to comply with ERISA's procedural requirements pertaining to reporting and notice. The basic premise of ERISA is that a plan sponsor will be free to determine what benefits the plan will provide, but that once such a determination has been made, the benefits must be described in a written plan that is available to participants at any time upon request. Thereafter, the participants are entitled to rely upon the plan document as defining the benefits currently being provided. Unless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the

> plan administrator or a court is free to deviate from the terms of the original plan. . . .
>
> Unlike the situation in *Hozier*[17] where the Plaintiffs sought benefits not provided for in the plan, the Plaintiffs' right to benefits in this case is derived exclusively from the terms of the plan; all the district court did was enforce the plan as written. Pet. App. 10a.

Respondents do not seek to recover some benefit which was promised to them but never provided for in any plan document. In this case, the appropriate remedy is that granted by the Third Circuit, i.e., to continue the benefits that the plan provided without the invalidated amendment.

A. A Participant Need not Demonstrate Prejudice or Detrimental Reliance to Enforce a Plan's Written Terms

Citing *Adams* v. *Avondale Industries Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990), petitioner argues that no "substantive remedy of prohibiting plan amendment" for Section 402(b)(3) violations is appropriate unless detrimental reliance is established. This argument grafts onto Section 402(b)(3) a condition that a number of courts have imposed in cases alleging violation of reporting and disclosure requirements. *See, e.g.*, *Gavonis* v. *Bricklayers, Masons & Plasterers*, 732 F.2d 250, 252-53 (1st Cir. 1984); *Lewandowski* v. *Occidental Chemical Corp.*, 986 F.2d 1006, 1008-10 (6th Cir. 1993); *Kreutzer* v. *A.O. Smith Corp.*, 951 F.2d 739, 743 (7th Cir. 1991); *Blau* v. *Del Monte Corp.*, 748 F.2d 1348, 1353-54 (9th Cir. 1984), *cert. denied* 474 U.S. 865 (1985).

These reporting and disclosure cases address not the terms of the plan but the manner in which the plan was or was not communicated to participants. They do not address fiduciary

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[17] *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155 (3rd Cir. 1990)

obligations under Section 402(b)(3) and other core fiduciary obligations.[18] It would be unprecedented for this Court to rule that a fiduciary breach under ERISA is without effective remedy. It is consistent with the basic thrust of ERISA to hold that the terms of a plan are not invalidated by a failure to abide by reporting and disclosure requirements, but the same concern for the integrity of plan terms precludes recognition of amendments which are not adopted in compliance with Section 402(b)(3). Resort to theories of detrimental reliance or prejudice is unnecessary when participants seek to enforce only the lawfully adopted terms of the plan.

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[18] ERISA's reporting and disclosure sections are separate from the fiduciary obligations sections. The statute sets forth its reporting and disclosure obligations for both pension and welfare plans at Title I, Subtitle B, Part 1. The statutory terms intended to ensure the equitable character of benefit plans by establishing standards of conduct, responsibility and obligations for fiduciaries of employee benefit plans are set forth in Title I, Subtitle B, Part 4. Part 4 separately sets forth bedrock sponsor and fiduciary obligations that Congress presumed would be at the core of every benefit plan.

The distinction between the reporting and disclosure cases under Part 1 of Title I and the instant case under Part 4 of Title I is sharply drawn by the fact that Congress did not require that a plan's amendment procedure be included in the plan features described in an SPD. See Sec. 102, 29 U.S.C. 1022; DOL Reg. 2520.102-3, 29 CFR 2520.102-3. The information required to be reported assumes compliance with mandatory plan design requirements. Similarly, the SPD is not required to report to participants that plan assets are being held in trust or that the fiduciaries are bound by the prudent person rule.

Curtiss-Wright as plan sponsor had a fiduciary obligation under Section 404(a)(1)(D) to ensure that its plan incorporated mandatory plan design features of Part 4, Title I of ERISA. *Batchelor* v. *Oak Hill Medical Group*, 870 F.2d 1446, 1449 (9th Cir. 1989) (Third party responsible for establishing pension fund had fiduciary duty regarding selection and retention of fund administrator); *Gelardi* v. *Pertic Computer Corp.*, 761 F.2d 1323, 1325 (9th Cir., 1985) (corporation had fiduciary duty and could be liable with respect to selection of plan administrator.)

B. Respondents Were Harmed by Petitioner's Violation of Section 402(b)(3)

Although detrimental reliance need not be shown, petitioner's failure to maintain its plan in accordance with Section 402(b)(3) has, in fact, harmed the participants. As the Third Circuit noted, the lack of an amendment procedure deprived the participants of the ability to know at any given time with certainty what the plan provided and how the plan terms could be modified in the future, in effect due process rights with real meaning for participants. But they are not the only harms suffered by the participants. Respondents were specifically deprived of their right to have a critical amendment to their lifetime retiree health care benefits made by a designated authority cognizant that an amendment—i.e., a substantive change and not a mere clarification of a pre-existing plan term—was being accomplished. It is worth noting that petitioner promised orally and in writing on hundreds of occasions over several decades that these benefits would continue for life. In that context, it should not be presumed that a responsible designated amending authority would rubber stamp the personnel department's knee-jerk reaction to the decision in *United Auto Workers* v. *Yardman*, ___ F.Supp. ___ (E.D.MI 1981), *affirmed in part, reversed in part and remanded*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), which recognized the rights of retirees to continuing health insurance coverage. Respondents were deprived of their right to an orderly amendment procedure in which all factors could have been weighed.

Moreover, these participants, the plan fiduciaries and this Court have been deprived of a record which would establish (1) that an amendment was promulgated, (2) the effective date of the amendment and (3) the actual decision maker. It took these participants seven years of litigation to ascertain that an amendment had been attempted. This is an unacceptable burden to place upon plan participants. The lack of an

amendment procedure contemplated by Section 402(b)(3) led directly to this harm.

C. The Common Law of Trusts Does Not Authorize Amendment by Manifestation of a Settlor's Intent Outside of Section 402(b)(3)

Petitioner relies upon common law trust principles to argue that a settlor may exercise a reserved power to modify or revoke a trust in any manner which sufficiently manifests his intention to modify where no method for amendment is specified. *See Biggers* v. *Wittek Industries Inc.*, 4 F.3d 291 (4th Cir. 1993); *Restatement (Second) of Trusts*, Section 331, Comment C. Petitioner relies on the *Biggers* decision for its argument that, as a trust settlor, it has sufficiently manifested its intention to modify the plan, although no method for amendment is specified. In *Biggers*, the Fourth Circuit held that "because the power to revoke or amend an employee welfare benefit plan is inherently reserved to the employer under ERISA, an employer who fails to include procedures in its plan for amendment is in the same position as the settlor who has reserved the power to amend but not provided a method for exercising it." 4 F.3d at 295.[19] Concluding that "in the

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[19] *Biggers* ignores Congress' decision to draw selectively from, but not to adopt in its entirety the common law of trusts. The affirmative requirement that every plan set forth an amendment process marks one area in which Congress opted not to adopt the common law of trusts. Under the common law, a trust instrument is not required to have an amendment procedure. The common law of inter vivos trusts did not require a writing at all and, to the extent a Memorandum existed, required only that it set forth "with reasonable definiteness the trust property, the beneficiaries and the purposes of the trust." *Restatement (Second) of Trusts*, Section 46; *see also Restatement (Second) of Trusts*, Section 39. However, the common law solution focusing on whether there is conduct which manifests the settlor's intention to modify the trust simply cannot be applied where Congress has chosen to reject the underlying common law trust principle.

Congress intended by its enactment of ERISA to adopt "*certain* principles developed in the evolution of the law trusts." *Firestone Tire &*

absence of provisions in a plan that provide procedures for amendment, a writing amends a plan only when accompanied by a clear manifestation of an intent to alter the policy or plan", (4 F.3d at 296), the court found that there was no "clear manifestation" of intent in the actions of the employer's corporate officers.[20]

ERISA's legislative history repeatedly demonstrates that Congress chose to reject certain common law trust fiduciary standards it considered insufficient to safeguard the rights of participants in employee benefit plans. H.R. Rep. No. 93-533 stated that

> reliance on conventional trust law often is insufficient to adequately protect the interests of plan participants and beneficiaries. This is because trust law had developed in the context of testamentary and *inter viva* trusts . . . with an attendant emphasis on carrying out the instructions of the settlor . . . The typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature . . . , 1974, *U.S. Cong. & Administrative News*, p. 4650.

The House Report further confirms that the fiduciary sections of the bill "incorporate the core of principles of fiduciary con-

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Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989), *quoting* H.R. Rep. No. 93-533, pl. 11 (1973), 93rd Congress Second Session 2, *reprinted in*, 1974 *U.S. Code Cong & Administrative News*, 4639, 4649. Congress did not adopt in ERISA the "entire body of state trust law lock, stock and barrel" but drew selectively from the common law. *Nieto v. Ecker*, 845 F.2d 868, 872 n. 2 (9th Cir. 1988). Congress intended to and did adopt principles of fiduciary conduct "but with the benefit of modifications appropriate for employee benefit plans". H.R. Rep. No. 93-533, 93rd Cong. Second Sess., *reprinted in* 1974 *U.S. Code Cong. & Administrative News*, 4639.

[20] Petitioner's actions cannot satisfy this forgiving *Biggers* standard, since it consistently denied that it had amended the plan, from the time of the purported amendment to the trial of this case, and cannot now contend that it intended to amend the plan.

duct as adopted from existing trust law but with modification appropriate for employer benefit plans".[21] *Ibid.*

When called upon to interpret ERISA federal courts have acknowledged that Congress drew selectively from the law of trusts. For example, in *Useden* v. *Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991), *cert. denied* 113 S.Ct. 2927, 124 L.Ed.2d 678 (1993), the Eleventh Circuit interpreted ERISA as embodying "a tailored law of trusts—a legal fabric which not only adopts familiar trust principles but also supplements these principles with more exacting standards." The Eleventh Circuit cautioned against an "unselective incorporation of trust law rules into ERISA" in favor of an approach which would "only incorporate [into ERISA] a given trust law principle if the statute's text negates an inference that the prin-

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[21] ERISA's legislative history showing that Congress rejected the pre-existing common law regarding trust amendments is exceptionally clear. The version of HR 2 reported out of Committee followed pre-ERISA common law by requiring only that a plan "identify and appoint an administrator . . . who shall . . . have full authority for the operation of such employee benefit plan including the authority to . . . amend such plan." H.R.2, 93rd Cong., 1st Sess. § 111(a)(1) (1973). The *Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reforms*, 93rd Cong. 2d Sess. Pt 3 at 12 (Comm. Print June 12, 1974) characterized the House version as deeming plan administrators "to have full authority and responsibility to operate the plan, including the authority to amend the plan." The Senate version of H.R.2 had no comparable provision. The actual statutory language adopted in Section 402(b)(3) rejects any implication that the plan administrator (or sponsor) have an implied authority to effectuate plan amendments. The Summary of Differences report to the House and Senate Conferees commented that "The conferees may wish to provide that each pension plan is to provide a procedure for specifying a funding policy and the allocation of responsibilities with respect thereto. In addition, each plan is to specify the procedure for amending the plan." Id. The final Conference Report also provides that "each plan . . . is to provide a procedure for amendments and for identifying who can amend the plan." H.R. Conf. Rep. No. 1280 *supra*, at 298; S. Conf. Rep. No. 1090, 93rd Cong., 2d Sess. 298 (1974). Congress thus very clearly rejected the common law approach to amendments now advanced by petitioner.

ciple was omitted deliberately from the statute". *Id.* In *Mertens* v. *Hewitt Associates*, 113 S.Ct. 2063, 2067, 124 L.Ed.2d 161 (1993), this Court endorsed the decision in *Nieto* v. *Ecker*, 845 F.2d 868 (9th Cir. 1988) and *Useden* rejecting attempts to incorporate into ERISA a right of action against non-fiduciaries who participate in breaches of fiduciary duty. This Court should similarly reject the *Biggers'* rule or any other interpretation of ERISA which incorporates into ERISA a common law standard of trust amendment which Congress rejected by the plain language of the statute. *Cf.. Central Bank of Denver, N.A.* v. *First International Bank of Denver, N.A.*, 114 S.Ct. 1439, 1447, 128 L.Ed.2d 119 (1994) (construing *Mertens* as holding that common law remedies under pre-ERISA trust law are not to be inferred into the statute if no comparable duty is set forth in ERISA).

D. The Existence of A Potential Equitable Remedy Should Not Preclude the Enforcement of the Plan's Written Terms

The Solicitor General places great store in the existence of an equitable remedy to force plans to comply with Section 402(b)(3) by adopting a proper amendment procedure in his argument that the remedy awarded respondents by the Third Circuit is inappropriate. Of course, the relief available under ERISA is not limited to equitable remedies. Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), entitles each participant "to recover benefits due him under the terms of the plan, to enforce his rights under the terms of the plan or to clarify his rights to future benefits under the terms of the plan" in addition to the equitable relief cited by petitioner and the Solicitor General.

However, the Solicitor General goes further and argues that the right of affected parties to compel compliance with the law removes the perverse incentive to forgo adoption of an amendment procedure. This argument ignores the reality that neither a plan participant nor a plan administrator will seek

that recourse; the former because he or she will not become aware that an amendment has been illegally adopted until after it has been applied, when the knowledge that a remedy is available to force the plan to have a proper procedure in the future would be cold comfort; the latter because a plan administrator generally is an employee of the plan sponsor and has no incentive to commence a suit to compel that sponsor to provide an amendment procedure.

IV. THE THIRD CIRCUIT HAS FASHIONED AN ELEGANT SOLUTION TO THE STATUTORY AND PRACTICAL ISSUES POSED

By failing to comply with Section 402(b)(3) by including an amendment procedure, petitioner and other plan sponsors might have rendered their benefit plans unamendable. *See, e.g., Deibler* v. *Local Union 23*, 973 F.2d 206, 210 n. 7 (3rd Cir. 1992); *Frank* v. *Colt Industries Inc.*, 910 F.2d 90 (3rd Cir. 1990); *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163 n. 9 (3rd Cir. 1990). However, the Third Circuit avoided that result by allowing a plan sponsor's decision making authority, here petitioner's board of directors, to restate and adopt the plan so as to include an amendment procedure. Pet. App. 11a.

This approach is consistent with the common law of trusts which resolves issues concerning the extent or method of a settlor's authority to revoke a trust by allowing the settlor first to modify the trust "by the insertion of a power to revoke and then exercising that power." G. Bogert & G. Bogert, *Law of Trusts and Trustees*, § 993, at 237-238 (rev. 2d ed. 1983). The two step solution is thus supported by common law precedent and not forbidden by express ERISA language. It elegantly resolves the divergent interests of participant, sponsor and fiduciary.[22]

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[22] The Third Circuit also recognized that amendments which increase benefits stand on a wholly different conceptual footing than amendments which decrease benefits. It is appropriate to hold plan spon-

CONCLUSION

The judgment of the court of appeals should be affirmed in all respects.

Respectfully submitted,

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sors to a more exacting standard for amendments which are solely in the interest of the plan sponsor and decrease benefits for a class of participants.

FOR ARGUMENT

(14)

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No. 93-1935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,

Petitioner,

—v.—

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

Despite plaintiffs' insistence to the contrary, this case is not about the termination of "lifetime" benefits. (Resp. Br. 1, 7, 9, 23).[1] As the District Court held and the Court of Appeals affirmed, plaintiffs' welfare benefits never vested, and Curtiss-Wright always reserved the right to amend its welfare benefits plan and to terminate benefits under the plan at any time for any reason. (Pet. App. 2, 13-15, 35-36). Plaintiffs did not seek certiorari on that or any other issue.

This case is about holding a plan sponsor monetarily liable for doing what it had the acknowledged right to do under its plan: amend the plan and terminate nonvested welfare bene-

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[1] "Resp. Br." refers to the merits brief filed on behalf of plaintiffs-respondents.

fits.[2] Plaintiffs call this holding an "elegant solution." (Resp. Br. 28). But that euphemism does not mask the fact that the effect of this solution is to compromise not only the plan sponsor's rights, but also ERISA's written instrument requirement and its balance of regulation and the costs of compliance. Plaintiffs' arguments, like the decision below, cannot be reconciled with the fundamental statutory principles at stake.

I. There Was No Violation of ERISA § 402(b)(3) or the Plan.

A. Plaintiffs' Proposed Interpretation of § 402(b)(3) Would Destroy the Integrity of the Plan Documents.

Plaintiffs acknowledge that any interpretation of ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), must comport with the purpose of the written instrument requirement of § 402(a)(1), 29 U.S.C. § 1102(a)(1): ensuring that participants and others can ascertain the current plan terms with certainty by examining the current plan documents. (Resp. Br. 9, 13). Plaintiffs also admit that the amendment here at issue was made by the revision of the governing plan document setting forth the plan terms. (Resp. Br. 2).

These concessions are fatal to plaintiffs' arguments. Although plaintiffs admit that ERISA defines "person" to include corporations, they argue that the reference in § 402(b)(3) to "person" somehow means something more specific. (Resp. Br. 12). Under plaintiffs' view, a plan would have to identify particular individuals or officers with a company's amendment authority. (*Id.*) Plaintiffs cite no authority, however, for this proposition.[3] Similarly, again without statu-

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[2] Since all affected retirees were given an option to convert to substantially equivalent individual policies, the effect was to shift the cost of continued insurance coverage rather than to terminate coverage. (J.A. 49).

[3] The mere fact that a particular plan sponsor may elect to write its plan documents so as to designate specific individuals to whom it delegates its power to amend (*see* Resp. Br. 12 n. 10, 15-16) does not signify the existence of a statutory requirement to do so.

tory support, plaintiffs argue that a plan must specify more detailed procedures for amendment than "by the Company." (Resp. Br. 11-12).[4]

To evaluate the validity of amendments under the type of procedure that plaintiffs say § 402(b)(3) requires, and so to ascertain the plan terms, a participant or other person looking at a revised plan document would have to determine what terms had been added by amendment, by what individuals they were adopted, and precisely how they were adopted. These are all matters not reflected in plan documents. As would the decision below, plaintiffs thus would make looking at the governing plan documents only a first, uncertain step on the way to determining the current plan terms.

Plaintiffs themselves recognize that such a result cannot be reconciled with ERISA. Although in basic agreement with Judge Roth's approach, which defines the amendment procedure "by the Company" in Curtiss-Wright's plan by reference to Delaware corporate law, plaintiffs would reject it because "the imputed amendment procedure is not to be found within any plan document . . . and, in that sense, the plan documents could not be read with the certainty that would be provided under the Third Circuit interpretation." (Resp. Br. 19). But the Third Circuit's, and plaintiffs' own, interpreta-

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[4] Plaintiffs attempt without merit to find support for this by analogy to the requirement in § 402(b)(1), 29 U.S.C. § 1102(b)(1), that a plan contain funding-related procedures. Plaintiffs argue, based on Department of Labor Interpretive Bulletin 75-5, that the "procedural detail necessary to satisfy section 402(b)(1)" is inconsistent with allowing an undetailed amendment procedure under § 402(b)(3). (Resp. Br. 11 n.8, 15 n.12). However, the Department of Labor Interpretive Bulletin that plaintiffs cite (and incorrectly suggest is a formally promulgated regulation) simply responds to a question about whether a particular funding procedure is permissible under § 402(b)(1). 29 C.F.R. § 2509.75-5 (FR-4). It nowhere suggests that anything like such a procedure is required to satisfy the statute, or that a lesser or different procedure would not also suffice. Indeed, in its introduction, the bulletin precludes any such inferences.

tion does not deliver this promised certainty. Instead, verification that the required procedure has been followed would be possible only by reference to facts not ascertainable from the plan documents.

Plaintiffs' own analysis, therefore, undermines their proposed interpretation of § 402(b)(3). If, as plaintiffs suggest, the goal is to promote certainty within the plan documents, § 402(b)(3) should be interpreted to allow a procedure that could be facially satisfied by what would be evident from the plan documents themselves. The statute therefore should be interpreted to allow an amendment procedure, such as that in Curtiss-Wright's plan, that is satisfied by the Company's revision of the plan documents.

B. Plaintiffs Cannot Prevail Based on the Construction Expressed by Judge Roth.

1. The Authority for the Amendment Is Established by Its Incorporation in the Plan Documents Published by Curtiss-Wright.

Perhaps aware that the decision below cannot be squared with ERISA's plain language or the overarching purpose of ERISA's written instrument requirement, plaintiffs try to align themselves instead with the view suggested below by Judge Roth: that action "by the Company" means action by one with authority to act on behalf of the Company.[5] Plaintiffs, however, like Judge Roth, mistakenly would limit that to mean "action by [the Company's] highest decision maker—in the case of petitioner, its corporate board of directors." (Resp. Br. 18; Pet. App. 8-9 n.3). There is no logical or legal basis for

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[5] The opinion below states: "Judge Roth believes that action by 'the Company' means action by the board of directors *or whomever of the company has the authority to take such action* under the corporation law of the state of incorporation of the company in question." (Pet. App. 8-9 n.3; emphasis added).

such a limitation; nor is it consistent even with Judge Roth's own analysis. As Judge Roth initially recognized (n.5, *supra*), corporate authority may be exercised not only by a corporation's board of directors, but also by those to whom the board has expressly or implicitly delegated such authority. *See, e.g.*, 8 Del. Code § 141(a); 2 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 438-44, at 387-401 (1990); *see also* p. 8 n.9, *infra*, and U.S. Br. at 19-20.

Further, where an amendment is made by the plan sponsor's publication of a revised plan document, there is no need to look beyond the plan document to evaluate the amendment's validity. If, as Judge Roth suggests, an amendment procedure may be incorporated from a source outside the plan documents, ERISA itself provides a particularly appropriate source. ERISA's requirements that the plan terms be set forth in a plan document and that the plan document be revised periodically to reflect amendments[6] implies a permissible procedure for amendment: by revision of the plan document. *Cf.* 29 C.F.R. §§ 2520.104a-4(b)(2) and 2520.104b-3(b) (the statutory requirements of informing participants and the Department of Labor of plan amendments may be met by providing a revised plan description or summary plan description incorporating the amendment). This procedure also provides the requisite basis for determining whether the plan has been amended. Once an amendment is incorporated in a published plan document, it is readily identifiable as a plan term, and no further procedural cues are needed for this purpose. Therefore, each plan should be deemed to incorporate as at least one permissible method of amendment the revision of the plan documents, and the incorporation of an amendment in a governing plan document bespeaks its validity.

The same result obtains under the default rule provided by trust law. Under that rule, an amendment is valid if the cir-

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[6] ERISA §§ 104(a)(1)(B), 104(b)(1), and 402(a)(1), 29 U.S.C. §§ 1024(a)(1)(B), 1024(b)(1), and 1102(a)(1).

cumstances sufficiently manifest the plan sponsor's intent that it be a plan term. *E.g.*, *Restatement, Second, of Trusts* § 331, comment c; *see also* U.S. Br. 25-26. A plan sponsor's revision of the plan documents unmistakably manifests its intent to change the plan terms. Again, therefore, the incorporation of an amendment in a plan document published to participants establishes its validity.

2. The Individuals within Curtiss-Wright Who Were Responsible for the Amendment Acted with the Company's Authority.

Plaintiffs' attempt to profit from the corporate authority standard proposed by Judge Roth fails for another reason as well. Even if it were appropriate to look beyond the plan documents in a case such as this, doing so only confirms that the amendment here at issue was made with Curtiss-Wright's authority.

Plaintiffs, as did Judge Roth, do no more than conclusorily assert the absence of corporate action. (Resp. Br. 9, 20).[7] But the record is to the contrary. The amendment at issue was drafted by Curtiss-Wright's Labor Counsel, Aaron J. Carr, and its Corporate Director of Benefits, Richard DuBois. (J.A. 69-70, 74, 77-78; Pet. App. 39). Mr. Carr's authority to exercise Curtiss-Wright's amendment power is clear: He previously had effected an amendment to the Curtiss-Wright Welfare Benefit Plan in 1976, for example, when he established both the plan Constitution and Trust Agreement under ERISA.

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[7] Plaintiffs' statement that the Third Circuit held that no one with authority had acted on Curtiss-Wright's behalf regarding the amendment at issue (Resp. Br. 9) appears to be based exclusively on the view of Judge Roth, which itself was based on her unduly restrictive and internally inconsistent interpretation of corporate authority. (*See* pp. 4-5, *supra*). Nothing in the decision below reflects such a holding by the court. To the contrary, by invalidating the amendment based exclusively on its conclusion that the plan failed to comply with § 402(b)(3), the Third Circuit essentially acknowledged that the amendment met all other prerequisites of a valid amendment. (Pet. App. 9-11 & n. 4).

(C.A. App. 1231; J.A. 79). By finding that the Constitution effectively set forth plan terms, the District Court implicitly found that Mr. Carr was authorized to establish them. (Pet. App. 36, 39-40). Similarly, by finding that the 1983 plan description drafted by Messrs. Carr and DuBois (and including the amendment at issue) was a "governing" plan document, and awarding benefits to plaintiffs under the terms set forth in that document (except for the disputed amendment), the District Court implicitly found that Messrs. Carr and DuBois were authorized to revise and restate the plan terms on the Company's behalf. (Pet. App. 38). The Third Circuit affirmed both of these underlying findings. (Pet. App. 4, 7, 10, 13-14). Further, the undisputed testimony at trial was that Curtiss-Wright's Labor Counsel and Corporate Director of Benefits—in 1983, Messrs. Carr and DuBois—were responsible for the Company's publication of plan descriptions. (C.A. App. 1115).

Any possible remaining doubt is removed by Curtiss-Wright's approval or ratification[8] of the amendment at issue on at least three separate occasions. First, the amendment was approved as it was being made by Curtiss-Wright's Executive Vice President Charles Ehinger, who reviewed the 1983 plan description before it was issued. (J.A. 74). Second, the amendment was ratified in November 1983 when the Company—through Mr. Ehinger and Executive Vice President Richard Sprigle, and with the knowledge of the Company's Chief Executive Officer, Chairman of the Board of Directors, and President, T. Roland Berner—terminated plaintiffs' benefits pursuant to the amendment and communicated that action by letter to the affected plan participants. (C.A. App. 1272-73, 719-21; J.A. 56-59). Third, both the amendment and the resulting termination of plaintiffs' benefits were ratified,

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[8] *See, e.g.*, 2 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 437.10, at 386 (1990) ("The question of whether an officer or agent acted within his or her authority is often eliminated by the fact that the corporation by its acts has ratified the act. . . .")

and the authority for them confirmed, by the Company's defense of this litigation from 1984 through the present. Plaintiffs' suggestion that the amendment at issue was the unauthorized action of unidentified "mid-level managers," "minor functionaries," or "the personnel department" without the approval of "a responsible designated amending authority" (Resp. Br. at 2 n.2, 3 n.4, 23) simply cannot be squared with the record.[9]

Plaintiffs also misplace reliance on an unwritten, informal amendment practice to which Mr. DuBois testified at trial. (Resp. Br. 2, 9 n.5). Any such unwritten procedure was, of course, not set forth in the plan documents, hence could not be part of the plan, and so is irrelevant. Plaintiffs themselves would have to agree. They criticize Judge Roth for looking beyond the plan documents to import an amendment procedure from state or federal statutes because, plaintiffs contend, participants would have difficulty discovering such a procedure. (Resp. Br. 19). An unwritten amendment practice would be even less likely to be discovered, and so, under plaintiffs' own analysis, would be an inappropriate standard for evaluating amendments. Further, the courts of appeals overwhelmingly have recognized that a written plan cannot be modified by unwritten or otherwise informal statements or

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[9] While there was no evidence at trial concerning the express delegation of corporate authority in the by-laws or by the board of directors (since this was not an issue at trial), such evidence is not necessary here. As one commentator explained the delegation of corporate authority to corporate officers and other agents:

> [E]xpress authority—formal action—is not always essential. In the absence of any statute, charter or bylaw requiring it, it is not necessary that there be a writing or a vote or resolution of the board of directors or trustees in order to confer authority on persons to bind the corporation. . . . [P]ower to do an act . . . may be inferred from circumstances or implied from the acquiescence of the corporation or its agents in a general course of business. . . . It may be inferred from the situation and conduct of the parties.

Fletcher, *supra* n.8, § 444, at 397-98.

policies. (*See* cases cited in Pet. Br. 24; *see also* AARP Br. 10-11). This bars treating an unwritten amendment procedure or practice as a plan term.

In any event, the unwritten practice identified by Mr. DuBois presents no obstacle to the validity of Curtiss-Wright's amendment. Plaintiffs do not dispute that the corporate executives responsible for the amendment at issue—Curtiss-Wright's Executive Vice President, Labor Counsel, and Corporate Director of Benefits—were members of the executive committee identified by Mr. DuBois. (J.A. 73). Instead, plaintiffs rely on the absence of committee minutes recording the adoption of the amendment. (Resp. Br. 9 n.5). But Mr. DuBois never testified that the executive committee could act only through a formal meeting producing minutes. Further, there would have been no need for minutes memorializing the amendment's adoption because it was being adopted pursuant to a revision of the plan documents. That itself provided a written record of the amendment. *See Aronson v. Servus Rubber, Division of Chromalloy*, 730 F.2d 12, 14-16 (1st Cir.), *cert. denied*, 469 U.S. 1017 (1984) (giving effect to substantial compliance with plan termination procedures), and other authorities cited in U.S. Br. 29 n.21.

II. ERISA Does Not Condition the Validity of an Amendment on the Plan's Compliance with § 402(b)(3).

A. Plaintiffs' View Would Impose a Penalty for Noncompliance that Is at Odds with ERISA's Remedial Scheme.

Under plaintiffs' view, § 402(b)(3) carries an implied, punitive remedy: A court may strike an amendment if there has been a violation of § 402(b)(3) regardless of whether the violation caused any harm. Plaintiffs point to no other instance under ERISA in which such a draconian penalty is provided,

expressly or by implication, without regard to harm to the plan or to participants. Nor could plaintiffs do so. Such a penalty would be irreconcilable with the careful balance that underlies ERISA as a whole and, particularly, its remedial scheme. (*See* Pet. Br. 21).

Plaintiffs do not address this balance. Instead, they urge that a "no harm no foul" approach would be "cynical." (Resp. Br. 7). The problem with plaintiffs' argument is two-fold. First, ERISA does provide a remedy for a violation of § 402(b)(3). As the Solicitor General explained, "[b]ecause [ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)] provides participants, beneficiaries, and fiduciaries with the ability to compel an otherwise recalcitrant employer to provide a definitive amendment procedure, there is no need to fashion a post hoc remedy of amendment invalidation to enforce compliance." (U.S. Br. 24). *See also* ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5) (similarly enabling the Secretary of Labor to compel compliance).

Second, Congress could have conditioned the validity of plan amendments on a plan's compliance with § 402(b)(3), but it did not. Plaintiffs' own arguments regarding the structure of the statute corroborate this conclusion. For example, plaintiffs analogize § 402(b)(3) to § 402(b)(1), which, plaintiffs stress, requires a mandatory "procedure for establishing and carrying out a funding policy." (Resp. Br. 11 n.8, 15 n.12). But the only logical remedy for a sponsor's failure to comply with § 402(b)(1) is to compel compliance under § 502(a)(3) or § 502(a)(5). It would be absurd to invalidate all plan funding, and so effectively invalidate the whole plan, based on such a violation, and plaintiffs cite no authority for doing so. Similarly, as numerous courts of appeals have held, a plan sponsor's failure to comply with the § 402(a)(1) written plan requirement does not invalidate the plan. (*See* U.S. Br. 22). In each of these instances, compelled compliance under § 502(a)(3) or § 502(a)(5), and not the nullification of sub-

stantive aspects of the plan, provides the appropriate remedy for a violation of a § 402 provision.[10]

B. Plaintiffs Have Not Identified any Harm from any Violation of § 402(b)(3).

Plaintiffs' argument that they do not need to show prejudice from an alleged violation of § 402(b)(3) to enforce a plan's written terms begs the question of whether the amendment here at issue should have been invalidated. (Resp. Br. 21). Plaintiffs themselves acknowledge that the amendment was a "new plan term" and that it was set forth in a governing plan document otherwise enforced by the lower courts. (*Id.* at 2). Thus, the disputed remedy essential to the judgment below is not the enforcement of plan terms; it is the invalidation of a plan term.

It is not surprising, then, that plaintiffs now strain to identify for the first time some prejudice to them flowing from the violation of § 402(b)(3) found below. Plaintiffs' primary argument is that "a responsible designated amending authority" might have stopped the amendment on behalf of Curtiss-Wright.[11] (Resp. Br. 23). That is not only speculative; it belies the record in this case. Curtiss-Wright executives testified unequivocally and unanimously that the amendment reflected the Company's intent. (J.A. 66, 79; C.A. App. 1271-73). Further, the amendment was promulgated, approved, and ratified

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[10] Contrary to plaintiffs' suggestion (Resp. Br. 22 & n.18), the establishment of plan provisions relating to amendments, like the establishment and termination of the plan itself, is a settlor function, not a fiduciary function. *See Restatement, Second, of Trusts* §§ 23, 330-32. In any event, the District Court dismissed plaintiffs' claims for breach of fiduciary duty (C.A. App. 114), and plaintiffs did not appeal from that ruling. Therefore, no such claims are before this Court.

[11] Plaintiffs insinuate that this might have been done because they had "lifetime" health insurance benefits. However, the District Court specifically found, and the Third Circuit affirmed, that plaintiffs' welfare benefits were not vested or lifetime benefits. (Pet. App. 2, 13-15, 35-36).

by authorized corporate agents and by authorized corporate actions. (*See* pp. 6-8, *supra*). It is absurd for plaintiffs now to claim that the amendment at issue and the subsequent termination of benefits somehow were not the Company's acts.

Plaintiffs quickly move on to another, equally untenable argument. They assert that they were harmed by the absence of an amendment procedure because they were "deprived of a record" of the amendment. (Resp. Br. 23). This is not a case, however, of a secret amendment remaining undisclosed to plan participants. *Compare Albedyll v. Wisconsin Porcelain Co, Revised Retirement Plan*, 947 F.2d 246 (7th Cir. 1991); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir.), *cert. denied*, 474 U.S. 865 (1985). To the contrary, plaintiffs acknowledge that the amendment here at issue was set forth in the 1983 governing plan document (Resp. Br. 2), and the record shows that this document was distributed to plan participants and available at the Company's benefits office. (J.A. 43, 69; C.A. App. 1188). This plan document itself provides the only statutorily required record of the amendment. *See* 29 C.F.R. §§ 2520.104a-4(b)(2) and 2520.104b-3(b) and p. 5, *supra*; *and see also Alday v. Container Corp. of America*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) ("The SPD is the statutorily established means of informing participants of the terms of the plan").

Further, plaintiffs do not explain how they were harmed by being "deprived," as they claim, of "a record which would establish (1) that an amendment was promulgated, (2) the effective date of the amendment, and (3) the actual decision maker." (Resp. Br. 23).[12] Plaintiffs received notice of the

[12] Plaintiffs' conclusory statement that they spent "seven years of litigation to ascertain that an amendment had been attempted" (Resp. Br. 23) not only ignores the disclosure of that amendment in the plan documents; it also disregards what this litigation was about prior to the District Court's reliance on § 402(b)(3) to invalidate the amendment. Plaintiffs did not bring suit to find out whether or not an amendment had been made; they knew it had been. Instead, plaintiffs alleged that their benefits had vested before 1983 and without regard to the 1983 amend-

amendment through its inclusion in the 1983 plan description. Its effective date was no later than the date of that plan document, which was published in April 1983, prior to the termination of plaintiffs' nonvested welfare benefits. Plaintiffs' lack of knowledge of the individuals within Curtiss-Wright who acted on behalf of the Company in promulgating the revised plan description certainly could not have harmed them, any more than such knowledge could have benefitted them, since revising the plan and terminating benefits were proper unilateral acts of the Company pursuant to rights expressly reserved by it both in prior summary plan descriptions distributed to plan participants and in the 1976 Constitution. In sum, with or without such a "record," plaintiffs' benefits would have been terminated lawfully, as they have been, by virtue of Curtiss-Wright's reservation of the right to effect such a termination.

Ultimately, plaintiffs cannot show any harm flowing from any violation of § 402(b)(3) because, no matter how the statute's requirements are construed, its purpose was fulfilled here. If a plan sponsor's compliance with § 402(b)(3) has any relevance to plan participants, it is as a complement to ERISA's written instrument requirement. In plaintiffs' own words, participants "must be able to ascertain whether putative amendments are part of the 'documents and instruments governing the plan.' " (Resp. Br. 13). By striking an amendment incorporated in the plan documents that were disseminated to plan participants and so unmistakably part of the plan, the decision below disserves the very purpose plaintiffs and the Third Circuit purport to promote.

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ment. (J.A. 12, 13). As noted previously (n.11, *supra*), the District Court and the Court of Appeals held for Curtiss-Wright on this issue, which has been fully and finally litigated.

CONCLUSION

For the foregoing reasons and those stated in Curtiss-Wright's opening brief, the judgment of the Court of Appeals should be reversed to the extent that it holds Curtiss-Wright liable to plaintiffs for the termination of their employee welfare benefits.

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OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION, PETITIONER

v.

FRANK C. SCHOONEJONGEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

Section 402(b)(3) of ERISA, 29 U.S.C. 1102(b)(3), requires every employee benefit plan to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." The questions presented are:

1. Whether Section 402(b)(3) is satisfied by a plan provision stating that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan."

2. Whether, in the absence of a plan-specified amendment procedure, any attempt by the sponsor to amend the plan is ineffective as a matter of law.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1935

CURTISS-WRIGHT CORPORATION, PETITIONER

v.

FRANK C. SCHOONEJONGEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case raises important issues concerning the interpretation and effect of a provision in Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001-1169 (1988 & Supp. V 1993). The Secretary of Labor is responsible for interpreting and enforcing the reporting, disclosure and fiduciary responsibility provisions in Title I of ERISA, including the provision at issue in this case.

STATEMENT

1. Section 402(a)(1) of ERISA provides that every employee benefit plan "shall be established and maintained pursuant to a written instrument" that provides for "one or more named fiduciaries" with "authority to control and manage the operation and administration of the plan." 29 U.S.C. 1102(a)(1). Section 402(b) of the Act requires, among other things, that each plan "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. 1102(b)(3). Section 402 says nothing about the consequences of a plan's failure to contain such provision.

Section 404(a)(1)(D) of ERISA requires plan fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent" with the Act. 29 U.S.C. 1104(a)(1)(D). The Act authorizes a participant or beneficiary to bring a civil action, under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), "to recover benefits due to him under the terms of his plan." Both the duties of plan fiduciaries and the rights of plan participants and beneficiaries are thus measured by the "terms" of the plan. If a plan is amended, of course, its terms change, so determining which amendments are valid is a prerequisite to knowing the terms of the plan.

2. The dispute in this case concerns the validity of a plan amendment adopted by petitioner, the Curtiss-Wright Corporation, which terminated the health benefits of respondents, a class of former employees. Pet. App. 2a. Since 1966, petitioner had provided health benefits to its retirees through a series of insurance carriers. *Id.* at 3a. Petitioner was the plan sponsor[1] and the plan administrator,[2] as well as

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[1] Under Section 3(16)(B) of ERISA, the term "plan sponsor" is defined to mean "(i) the employer in the case of an employee benefit plan established

the plan's sole source of funding. *Ibid.* In ERISA terminology, the plan was a single-employer, employee welfare benefit plan.[3]

In 1976, following the enactment of ERISA, petitioner formalized its health benefits plan by adopting a written Constitution. Pet. App. 4a. In that Constitution, petitioner expressly reserved the right "at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan," and the right "to terminate the Plan established [t]hereby for any reason at any time." *Ibid.* Various documents distributed to plan participants during the 1970s and early 1980s contained similar language. *Id.* at 4a-5a. Beginning in 1979, summary annual reports provided to plan participants stated: "The company expects and intends to

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or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan." 29 U.S.C. 1002(16)(B).

[2] Section 3(16)(A) of ERISA defines the term "administrator," in pertinent part, as "the person specifically so designated by the terms of the instrument under which the plan is operated," or, "if an administrator is not so designated, the plan sponsor." 29 U.S.C. 1002(16)(A)(i) and (ii).

[3] Under the Act, a "multiemployer plan" is a plan "to which more than one employer is required to contribute," and "which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer." 29 U.S.C. 1002(37)(A)(i) and (ii). Any other plan is a "single-employer plan." 29 U.S.C. 1002(41) (Supp. V 1993). The term "employee benefit plan" means an "employee welfare benefit plan," an "employee pension benefit plan," or a plan that is both an employee welfare benefit plan and an employee pension benefit plan. 29 U.S.C. 1002(3). The terms "employee welfare benefit plan" and "employee pension benefit plan" are defined, respectively, in Section 3(1) and (2) of the Act. 29 U.S.C. 1002(1) and (2).

continue this plan indefinitely, but reserves the right to discontinue or amend it." *Id.* at 4a.

In early 1983, petitioner issued a revised summary plan description (SPD) that stated: "Coverage under this Plan will cease for retirees and their dependents upon the termination of business operations of the facility from which they retired." Pet. App. 5a-6a.[4] On November 4, 1983, petitioner notified respondents, who had retired from petitioner's Wood-Ridge, New Jersey, plant, that petitioner would be closing the Wood-Ridge plant at the end of the month, and that respondents' post-retirement health benefits would cease at that time. *Id.* at 6a, 119a. Respondents brought this action in federal district court to challenge the termination of their benefits.

3. After a bench trial, the district court held that petitioner had not effectively amended its plan to permit the termination of respondents' health benefits. Pet. App. 34a-41a. The court found that petitioner had reserved a right to amend the plan, so that respondents were not entitled to vested health benefits for life. *Id.* at 6a, 36a, 40a.[5] In the district

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[4] The parties characterize differently the manner in which this language was incorporated in the plan. According to petitioner, the language was added to the SPD by petitioner's Corporate Director of Benefits and its Labor Counsel, with the approval of its Executive Vice President—the same corporate officials who had established the Plan Constitution in 1976 and were responsible for administering the plan. Pet. 5. Respondents contend that petitioner disavowed having had any intent to amend the plan, and that employees who had no authority to amend the plan amended it inadvertently "through an act of casual redrafting." Br. in Opp. 1-4. The parties also dispute whether the 1983 SPD was distributed to retirees. Pet. App. 5a.

[5] ERISA itself does not require the vesting of welfare benefits, 29 U.S.C. 1051(1), but the parties may agree to vest such benefits as a matter of contract, expressed, for example, through collective bargaining agreements or plan documents. *In re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986). In this case, the question of vested lifetime

court's view, however, petitioner had failed to provide in the plan documents a procedure for amending the plan, in violation of Section 402(b)(3) of ERISA. Pet. App. 37a. Consequently, the district court held, the amendment was void as a matter of law. *Id.* at 40a. Based on those findings, the court entered judgment for respondents in the amount of $2,681,086, *id.* at 105a-106a, the value of the health benefits that respondents would have received had those benefits continued until November 1990, when the benefits were terminated by petitioner through formal action of its board of directors. Br. in Opp. 8.

4. The court of appeals affirmed. Pet. App. 1a-16a. As an initial matter, it agreed with the district court that the amendment provision in petitioner's plan failed to satisfy the requirements of Section 402(b)(3) of ERISA. Pet. App. 7a-9a. In the court's view, "[a] primary purpose of §402(b)(3) is to ensure that all interested parties will know how a plan may be altered and who may make such alterations," and the simple reservation of a right to amend by the plan sponsor does not accomplish those objectives. *Id.* at 8a. The court rejected petitioner's contention that reservation of amendment authority to "the Company" is equivalent for Section 402(b)(3) purposes to a provision authorizing amendment by "the Trustees" of the plan, the designation under a multiemployer pension plan that had passed muster in *Huber* v. *Casablanca Indus., Inc.*, 916 F.2d 85 (3d Cir. 1990), cert. dismissed, 113 S. Ct. 1070 (1993). Pet. App. 8a. The court was of the view that a reference to "the Trustees" clearly identifies the "persons" authorized to amend the plan under Section 402(b)(3), while a reference to "the Company" does not. The Court suggested that *Huber* might provide a better analogy if petitioner's plan

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benefits is not before the Court. The sole question here is whether petitioner terminated respondents' benefits through a valid plan amendment.

had provided for modification by the "Board of Directors," rather than by "the Company." Pet. App. 8a.

The court of appeals also agreed with the district court that, in the absence of a plan-specified amendment procedure, petitioner's 1983 amendment was invalid as a matter of law. Pet. App. 9a-11a. In the court's view, that result is necessary to accomplish "fundamental" purposes of ERISA:

> The basic premise of ERISA is that a plan sponsor will be free to determine what benefits the plan will provide, but that once such a determination has been made, the benefits must be described in a written plan that is available to participants at any time upon request. Thereafter the participants are entitled to rely upon the plan document as defining the benefits currently being provided. Unless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan. It is in this way that ERISA provides certainty and protects participants against frustration of their legitimate expectations.

Id. at 10a.

The court of appeals relied, in addition, on case law holding that "amendments which are not adopted substantially in accordance with a plan's amendment procedures are ineffective to alter the terms of a plan." Pet. App. 10a, citing *Albedyll* v. *Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 255 (7th Cir. 1991), and *Frank* v. *Colt Indus., Inc.*, 910 F.2d 90, 98 (3d Cir. 1990). The court believed that the same result should obtain when the plan provides no amendment procedures at all, because, otherwise, those who

violate Section 402(b)(3) would be in a better position than those who comply with it. Pet. App. 11a.[6]

Judge Roth concurred in the judgment. Pet. App. 8a n.3. In her view, action by "the Company" means action by its board of directors or by whatever other person or entity within the corporation has authority to take such action as a matter of state corporation law. Judge Roth concluded that the amendment at issue in this case was not effective, however, because, she believed, neither petitioner's board nor any other person or entity with power to act on petitioner's behalf had issued or ratified it. *Ibid.*

SUMMARY OF ARGUMENT

I. Petitioner's plan meets the baseline requirements of Section 402(b)(3). By specifying that petitioner reserves the right to amend, the language at issue clearly identifies petitioner as the "person[] who ha[s] authority to amend the plan." The court of appeals' view that the Act requires an identification of the particular individuals within the corporation with authority to act is inconsistent with the definition of "person" in Section 3(9) of the Act, which expressly encompasses corporations. If Congress had intended to require plans to specify the individuals with authority to modify the plan, it would have said so.

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[6] The court limited the scope of its holding in two respects. First, it held that sponsors that have reserved a right to amend in language that does not comply with Section 402(b)(3) are not "forever foreclosed" from amending their plans. Pet App. 11a. Rather, "an amendment designed solely to bring a plan into compliance with [Section 402(b)(3)] can be effectively adopted by formal action of those who possess the sponsor's final management authority"—in this case, formal action by petitioner's board of directors. *Ibid.* Second, the court noted that its holding "should not be construed to extend beyond a situation in which a plan sponsor amends the plan in a fashion which is advantageous to the sponsor's interest and in which the beneficiaries of the plan later challenge that amendment." *Id.* at 11a n.5.

The court of appeals' holding that the plan amendment procedure must be spelled out in detail is based on that court's view that a primary purpose of Section 402(b)(3) is to provide disclosure to plan participants of the means by which the plan may be amended. Although we agree that Section 402(b)(3) serves an important, indirect disclosure function, it is clear from the language of Section 402(b)(3) and the structure of the Act that the Section's predominant purpose is to ensure that employee benefit plans all have some mechanism for amendment. The issue is not, therefore, whether petitioner's plan describes its amendment procedure in detail, but rather whether it provides enough information to permit interested parties to determine when and whether an amendment has been promulgated.

This case presents a close question, but we ultimately agree with Judge Roth that petitioner's reservation of the right to amend should be read against the background of corporation law to mean amendment by petitioner's board of directors or by any individual or committee to whom the board has delegated that authority. Understood in that fashion, the provision provides sufficient guidance to evaluate the bona fides of any given amendment. Although a more closely drawn and defined procedure would facilitate that evaluation, the Act does not define or restrict the particular amendment procedures that may be used.

II. The Third Circuit erred in holding that an amendment promulgated in the absence of a plan-specified amendment procedure is void as a matter of law. In light of Congress's intent through Section 402(b)(3) to ensure that each employee benefit plan would include some mechanism for amendment, it is perverse to suggest that the failure of a plan document to specify a procedure for amendment means that the plan cannot be amended. When Congress intended, under the Act, to restrict or condition a sponsor's ability to amend, it did so in no uncertain terms. Moreover, as Congress provided

participants, beneficiaries, and fiduciaries with the ability, through Section 502(a)(3) of the Act, to compel plan sponsors to provide plan amendment procedures, there is no need to fashion a judicial remedy to enforce compliance.

Established principles of trust law provide a sound basis for determining the validity of an amendment promulgated in the absence of a plan-specified procedure. Under trust law, when a settlor makes clear his reservation of authority to amend the trust but fails to set out a procedure for doing so, he may exercise that authority in any manner that sufficiently manifests his intention to modify the trust. By analogy, a plan sponsor should be required to establish that an amendment has been promulgated with due authority, in a formal writing, and delivered to the plan's fiduciaries.

Contrary to the view of the court of appeals, as a general matter, when plan documents make clear that the plan may be amended, giving effect to written plan amendments is wholly consistent with employees' reliance interests. By refusing to give effect to amendments otherwise authorized by a plan on the basis of the plan's violation of Section 402(b)(3), the court's automatic invalidation rule deprives employees of their ability to rely on the terms of the written plan, and thereby undermines one of the fundamental goals of the Act.

Finally, although we agree that an amendment passed in violation of plan-specified procedures is invalid, we do not believe that conclusion compels the invalidation of amendments passed in the absence of an amendment procedure conforming to the requirements of Section 402(b)(3). The two circumstances raise wholly different concerns under the statute, lead to differing results under the common law of trusts, and have disparate effects on employees' reliance interests. Moreover, we see no "perverse incentives" problem in treating the circumstances differently, because employees have the power, under Section 502(a)(3) of the Act, to force an

otherwise recalcitrant employer to set out in the plan procedures for amendment of the plan.

ARGUMENT

I. THE AMENDMENT PROVISION IN PETITIONER'S PLAN SATISFIES THE REQUIREMENTS OF SECTION 402(b)(3) OF ERISA

Section 402(b)(3) of ERISA requires every employee benefit plan to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. 1102(b)(3). Although in our view whether petitioner's plan complies with Section 402(b)(3) presents a close question, on balance we agree with Judge Roth that the plan's reservation to petitioner of the power to amend satisfies the requirements of the Act, standing alone. The Secretary of Labor would, however, have authority under Section 505 of the Act, 29 U.S.C. 1135, to issue regulations requiring more detailed plan provisions to ensure the availability to participants, beneficiaries, and fiduciaries of sufficient information to determine more precisely how an amendment may be adopted and whether a particular amendment has become effective.

1. Petitioner's plan states: "[T]he Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." Pet. App. 4a. That language identifies the "Company" as "the person[] who ha[s] authority to amend the plan." The court of appeals believed that language insufficient, however, on the ground that naming "the Company" does not disclose "what individuals or bodies within the Company"—such as the board of directors—can promulgate an effective amendment. *Id.* at 8a.

The court's conclusion is at odds with the text of the Act. Section 3(9) of ERISA defines "person" to mean "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." 29 U.S.C. 1002(9). Although "individual" is included within this definition of "person," so too is "corporation." Nothing in Section 402(b)(3) suggests that a plan complies with Section 402(b)(3) only if it designates particular types of "person[s]," such as specific individuals within a corporation. Indeed, the Secretary of Labor has relied on the definition in Section 3(9) in an analogous context to permit a plan sponsored by a corporation to designate the corporation itself as the "named fiduciary" under Section 402(a)(1) of ERISA, 29 U.S.C. 1102(a)(1). 29 C.F.R. 2509.75-5 (FR-3) (ERISA Interpretive Bulletin 75-5). If designating the corporation itself "satisfies the requirement of enabling employees and other interested persons to ascertain the person or persons responsible for operating the plan" under Section 402(a)(1), as the Secretary stated in Interpretive Bulletin 75-5, *supra*, it should serve equally well to identify the person or persons authorized to amend the plan under Section 402(b)(3).[7]

2. That does not end the matter, however, because Section 402(b)(3) also requires that a plan "provide a procedure for amending such plan." In that respect, the sufficiency of the language in petitioner's plan presents a closer question.

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[7] The Act does not, in terms, require "identification of the persons with authority to amend the plan," but rather "provi[sion] [of] a procedure * * * for identifying the persons who have authority to amend the plan." 29 U.S.C. 1102(b)(3). Although we acknowledge that the language used is curious, it is doubtful that Congress intended by it to require a process for identifying the *individuals* with authority to amend the plan; given Section 3(9)'s expansive definition of the term "person," if Congress had intended in Section 402(b)(3) to refer to "individuals," it presumably would have used that word instead.

Although the plan plainly identifies petitioner as the party authorized to amend the plan, and makes clear that petitioner's power to amend the plan is unrestricted in both timing and scope, it says nothing on its face about *how* petitioner must act to effect an amendment.

In common usage, the term "procedure" means "a particular way of doing or of going about the accomplishment of something." *Webster's Third New International Dictionary* 1807 (1986); see also *The Random House Dictionary of the English Language* 1542 (2d ed. 1987) (defining "procedure" to mean "a manner of proceeding in any action or process" or "a particular course or mode of action"). In a somewhat narrower connotation, the term is understood to mean "any given mode of conducting legal, parliamentary, or other business." *Ibid.*

As the court of appeals noted, petitioner's plan did not, in terms, specify "a particular way" petitioner would "go[] about" promulgating amendments to the plan. Nor did the plan identify the body or officers within petitioner with authority to change the plan. On the other hand, as Judge Roth noted, action by a corporation is generally understood to mean "action taken by the board of directors or whomever of the company has the authority to take such action under the law of the state of incorporation of the company in question." Pet. App. 8a n.3; see generally 2 W. Fletcher, *Cyclopedia of the Law of Private Corporations* §§ 495 *et seq.* (1990). In that respect, provision for action by petitioner, a corporation, may be understood to mean action according to the corporate "mode."

The dispute between the majority and concurring opinions in this case comes down to a disagreement over the extent to which Section 402(b)(3) requires the plan to set out expressly the facets of the amendment procedure that may otherwise be understood to be incorporated into the plan as a matter of law. The language of Section 402(b)(3), read in isolation, does not

resolve that question. We believe that the answer hinges on the purpose of the Section 402(b)(3) requirement, and that such purpose is best discerned through analysis of that Section's role within the overall structure of the Act.

a. Section 402 of the Act lists certain basic provisions that "shall" be included in every employee benefit plan. 29 U.S.C. 1102. Section 402(a)(1) requires that all plans be "established and maintained pursuant to a written instrument." 29 U.S.C. 1102(a)(1). In addition to requiring that plans provide a procedure for their amendment, Section 402(b) requires that all plans provide for one or more "named fiduciaries," provide "a procedure for establishing and carrying out a funding policy and method," "describe any procedures under the plan for the allocation of responsibilities for the operation and administration of the plan," and "specify the basis on which payments are made to and from the plan." 29 U.S.C. 1102(b).

The requirements of Section 402(b) serve an important, albeit indirect, informational function. Under Sections 104(b)(2) and (4) of the Act, plan administrators must make available to participants, upon written request, copies of plan documents, including the latest summary plan description and annual report, the trust agreement, and "other instruments under which the plan is established or operated." 29 U.S.C. 1024(b)(2) and (4). Because a plan document setting forth the information required under Section 402(b) is an "instrument[] under which the plan is established or operated," plan participants may obtain and review such a document upon request. The written instrument requirement of Section 402(a)(1) thus works in tandem with the disclosure requirements of Section 104(b) to ensure that all affected parties have access to the documents that provide the structure of ERISA plans.[8]

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[8] The ERISA conference report confirms that one important purpose of Section 402(a)(1)'s requirement of a written plan is to provide information to

Although Congress thus intended to afford participants and beneficiaries access to the documents comprising ERISA plans, we believe the court of appeals erred in giving dispositive effect to what it perceived to be "[a] primary purpose of §402(b)(3)[,] * * * to ensure that all interested parties will know how a plan may be altered and who may make such alterations." Pet. App. 8a. Congress unquestionably intended, through Section 402(a)(1)'s written instrument requirement, to provide affected parties with access to the document containing the plan's amendment procedure—the same access such parties have to all plan documents—but there is no indication in the text or relevant legislative history that Section 402(b)(3) was itself enacted for the purpose of providing that disclosure. To the contrary, the language of Section 402(b)(3), that Section's place within the structure of the Act as a whole, and the (admittedly sparse) legislative history all indicate that the Section's predominant purpose is simply to ensure, for functional reasons, that all plans have some definitive means for their amendment.

To begin with, Section 402(b)(3) is not located in the "Reporting and Disclosure" part of the Act, 29 U.S.C. 1021-1031. It is, instead, codified in the "Fiduciary Responsibilities" part of the Act, 29 U.S.C. 1101-1114, within a section entitled "Establishment of plan." 29 U.S.C. 1102. More precisely, it is located within a subsection entitled

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plan participants about its basic structure. In discussing Section 402(a), the report explains:

> [E]very covered employee benefit plan (both retirement and welfare plan) is to be established and maintained in writing. A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan. Also, a written plan is required so the employees may know who is responsible for operating the plan.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 297 (1974).

"Requisite features of plan." 29 U.S.C. 1102(b). Section 402(b) is, as its title suggests, written in imperative language, providing that "[e]very employee benefit plan *shall*" include certain operational provisions, including a procedure for amending the plan. 29 U.S.C. 1102(b) (emphasis added). The language used suggests that Congress believed it critical that all plans have, as a basic term, some provision for their amendment,[9] just as all plans must (in addition to being in written form) have, as basic terms, some provision for "named fiduciaries," a "funding policy and method," "allocation of responsibilities for the operation and administration of the plan," and "the basis on which payments are made to and from the plan." Section 402 thus prescribes the framework for what are, in effect, the constitutional elements of the plan—those that allocate the powers to take actions affecting the plan, provide for its financial support, and set out the bases for its benefits payments. Understood in this light, Section 402, including its subsection (b)(3), need not be read (in the absence of implementing regulations) to require any particular level of detail. It is sufficient if the essential elements are present to enable the plan to function. Cf. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 407 (1819) ("[I]t is a constitution we are expounding.") (emphasis omitted).

It might be argued that if Congress had intended to ensure nothing more than that all plans would be subject to amendment, it could have accomplished that result directly,

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[9] Notwithstanding Congress's desire that plans be amendable generally, employers sometimes do (and under the Act may), by using sufficiently clear language in a plan document, choose to bind themselves to provide a specified level of benefits to certain participants (generally retirees) for life. See *United Steelworkers* v. *Connors Steel Co.*, 855 F.2d 1499, 1504-1505 (11th Cir. 1988), cert. denied, 489 U.S. 1096 (1989); *Local Union No. 150-A, UFCW* v. *Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir. 1985); *Policy* v. *Powell Pressed Steel Co.*, 770 F.2d 609, 614-615 (6th Cir. 1985), cert. denied, 475 U.S. 1017 (1986).

simply by stating that all plans are amendable as a matter of law.[10] Such a directive would not have been sufficient, however, because, at least with respect to some plans, it would not have identified *who* could effect an amendment and accordingly would not have accomplished an allocation of that fundamental power. Moreover, while the legislative history is sparse in many respects, it reveals that Congress considered and rejected language that would have prescribed, with respect to specified types of amendment, a particular manner of amendment (by the plan administrator) in favor of permitting each plan to identify on its own the party having

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[10] The language Congress actually used has been read by some courts to accomplish precisely that result. For instance, in *Biggers* v. *Wittek Indus., Inc.*, 4 F.3d 291, 295 (4th Cir. 1993), the court believed that "the power to * * * amend an employee welfare benefit plan is inherently reserved to the employer under ERISA," and it held, accordingly, that "an employer who fails to include procedures in its plan for amendment is in the same position as the settlor who has reserved the power to amend but not provided a method for exercising it." Accord *Murphy* v. *Keystone Steel & Wire Co.*, 850 F. Supp. 1367, 1382 (C.D. Ill. 1994). We do not contend here that ERISA plans are, by virtue of ERISA itself, amendable in the absence of any express reservation of amendment authority. We believe that such an absolute rule would present difficulties, in light of the very real possibility that employees might in some circumstances justifiably assume from the absence of any express notice of amendment authority that their benefits will not be terminated or modified to their detriment. By analogy, under the common law of trusts, a settlor is permitted generally to modify the trust only if he has reserved the power to do so by the terms of the trust. *Restatement (Second) of Trusts* §§ 330, 331 (1959); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* §§ 992, 998 (rev. 2d ed. 1983). The equities may not, on the other hand, always run in favor of holding an amendment invalid solely on the ground that the underlying plan fails to contain an express reservation of the power to amend. For instance, participants might justifiably rely on benefit-enhancing amendments to a plan even in the absence of a plan provision expressly reserving the right to amend. In any event, those issues are not presented by this case.

authority to amend and the procedure to be used.[11] To the extent that the drafting history provides any insight into Congress's intent, it reinforces the textual implication that Congress was focussing primarily on ensuring the existence of a mechanism for amendment of ERISA plans.

The functional orientation of Section 402(b)(3) is demonstrated, in addition, by contrast to the provisions of ERISA that are in terms disclosure-oriented. In particular, Section 104(b)(1) requires the plan administrator to furnish periodically to each participant and beneficiary "a copy of [the] summary plan description, and all modifications and changes referred to in section [102(a)(1)]." 29 U.S.C. 1024(b)(1) (Supp. V 1993). Whereas Section 402(b)(3) states, without elaboration, that the plan "shall provide a procedure

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[11] The concept of plan amendment appeared for the first time when the primary House bill, H.R. 2, was reported out of committee. In that draft, the bill required that the plan "identify and appoint an administrator * * * who shall * * * have full authority for the operation of such employee benefit plan including the authority to * * * amend such plan where such an amendment is necessary to meet the requirements of this Act or where such an amendment is necessary to protect the interests of the participants." H.R. 2, 93d Cong., 1st Sess. § 111(a)(1) (1973). The corresponding section of the Senate bill, S. 4 (later designated H.R. 2), included no language whatever respecting amendment. See S. 4, 93d Cong., 1st Sess. § 510 (1973). In a document listing the differences between the House and Senate bills, the staff of the Conference Committee suggested that "[t]he conferees may wish to provide that each pension plan is to provide a procedure for specifying a funding policy and the allocation of responsibilities with respect thereto. In addition, each plan is to specify the procedure for amending the plan." *Summary of Differences Between the Senate Version and the House Version of H.R. 2 To Provide for Pension Reform*, 93d Cong., 2d Sess. Pt. 3, at 12 (Comm. Print June 12, 1974). That suggestion was evidently adopted and incorporated into the language passed by both Houses without comment. The conference reports note only that "[e]ach plan * * * is to provide a procedure for amendments and for identifying who can amend the plan." H.R. Conf. Rep. No. 1280, *supra*, at 298; S. Conf. Rep. No. 1090, 93d Cong., 2d Sess. 298 (1974).

for amending [the] plan," 29 U.S.C. 1102(b)(3), Section 102(a)(1) requires that summary plan descriptions and summaries of modifications be "written in a manner calculated to be understood by the average plan participant" and, further, that plan descriptions "be sufficiently accurate and comprehensive to reasonably apprise * * * participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. 1022(a)(1). It is noteworthy that Congress did not include the procedure for amendment of the plan among the information required to be disclosed in summary plan descriptions.[12]

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[12] Section 102(b) requires that plan descriptions and summary plan descriptions include the following information:

> The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under [Section 503, 29 U.S.C. 1133]).

29 U.S.C. 1022(b). The Report of the Senate Committee on Labor and Public Welfare confirms that Congress intended through this list to ensure that summary plan descriptions would contain "a summary of the plan's important provisions." S. Rep. No. 127, 93d Cong., 1st Sess. 28 (1973); see also H.R. Conf. Rep. No. 1280, *supra*, at 258 ("summary is to include important plan provisions").

b. Section 402(b)(3)'s functional orientation should guide this Court's determination of the detail and manner in which a plan's amendment procedure must be drafted. If, as the court of appeals believed, the primary purpose of Section 402(b)(3) were disclosure, an amendment procedure might well have to be drafted in a manner that is both comprehensible to the average plan participant and comprehensive (*i.e.*, able to be understood without reference to the underlying requirements of ERISA or background principles of corporate law). But because the primary purpose of Section 402(b)(3) is to ensure that each plan contain some mechanism for amendment, the sufficiency of a plan-specified procedure should turn, instead, on whether the information set forth—here, amendment by petitioner—provides plan fiduciaries (and others) with a basis for determining when and whether the plan has been amended.[13]

Although the question is not free from doubt, we believe the information provided by petitioner's plan meets the baseline requirements of the Act. The plan's provision that

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[13] Most multiemployer plans should pass muster under that standard. In circumstances involving multiemployer pension plans, the entity with the power to amend the plan will generally be a committee, joint board of trustees, or other similar group comprised of representatives of the parties who established or maintain the plan. 29 U.S.C. 1002(16)(B). The decision-making processes of such boards or committees will ordinarily be set forth in detail in their operative documents. See, *e.g.*, 29 U.S.C. 186(c)(5); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 328-332, 336-337 (1981) (discussing the decision-making requirements of 29 U.S.C. 186(c)(5)). If, as we believe, an amendment provision may incorporate or be understood against background legal principles, then procedures set forth elsewhere in applicable plan documents should also suffice. Although the Third Circuit's decision in *Huber* v. *Casablanca Indus., Inc.*, 916 F.2d 85 (1990), cert. dismissed, 113 S. Ct. 1070 (1993), does not identify the source of the particular procedure followed by the trustees in that case, we think it likely that the procedure was described in underlying trust documents and that the case was, therefore, correctly decided.

amendments are to be effected by petitioner means, at least, that an amendment will be validly promulgated only if adopted by action of petitioner's board of directors, or through action by a committee or individual to whom the board has delegated such authority. Del. Code Ann. tit. 8, § 141(a)(1991).

We acknowledge some discomfort in suggesting that the plan's language, which amounts to little more than a bare reservation of the right to amend, provides a "procedure" for amendment. The Act itself, however, provides no guidance as to what further information may be required. For instance, the court of appeals suggested that provision for amendment through action "by the board of directors" might suffice. We agree that the determination whether an amendment has been duly authorized would be facilitated if all corporate sponsors were required to restrict amendment authority to their boards of directors or to particular, identified corporate officers. Proof problems might also be averted if all amendments were required to be effected through a distinct written document, as opposed to the situation in this case, in which the only writing that manifested the amendment was a revised and restated summary plan description. The Act on its face does not, however, forbid a corporation from reserving its right to act in any authorized manner or dictate a particular amendment format.[14]

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[14] Although the Secretary of Labor has broad rulemaking authority under Section 505 of ERISA, 29 U.S.C. 1135, the Secretary has not, to this point, provided interpretive guidance respecting Section 402(b)(3) nor exercised that rulemaking authority to require plan amendment procedures more detailed than those required by the terms of the Act. As petitioner notes (Pet. 8), the Internal Revenue Service promulgated a prototype plan with language similar to that at issue here, see 7 *Pension and Profit Sharing 2d* 140,569 (R.I.A. 1992), which presumably reflects the Service's understanding regarding the requirements of Section 402(b)(3), and which may have led plan sponsors to assume that such language suffices to meet the requirements of the Act. Although the dissemination of that prototype

II. A FAILURE TO COMPLY WITH SECTION 402(b)(3) OF ERISA DOES NOT AUTOMATICALLY RENDER VOID AN AMENDMENT THAT IS OTHERWISE AUTHORIZED BY THE PLAN

The court of appeals held that when an employee benefit plan reserves the right of the sponsor to amend, but fails to provide a procedure for amendment in conformity with the requirements of Section 402(b)(3), the plan may not be amended. Pet. App. 11a. In the court's view, an amendment adopted in the absence of a plan-specified amendment procedure is a nullity, ineffective as a matter of law to change the prior terms of the plan.[15] The court's rule has no basis in

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provision, and the use of similar language in other standard forms (see Pet. 8), may, as a practical matter, weigh against recognition by the Court of a more demanding construction of Section 402(b)(3), the prototype language is itself owed no heightened deference as a legal matter, because the Service has no interpretive or enforcement authority with respect to matters arising under Section 402 of the Act.

[15] As described at note 6, *supra*, the court of appeals qualified its holding in two material respects. First, the court made clear that it would permit a sponsor of a plan lacking an amendment procedure to amend its plan to provide such a procedure. Pet. App. 11a. Second, it restricted the scope of its holding to circumstances in which the sponsor has acted to amend the plan "in a fashion which is advantageous to the sponsor's interest." *Id.* at 11a n.5. Neither qualification is entirely faithful to the court's broad holding that "[u]nless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan." *Id.* at 10a. In any event, this case does not present the issue of whether, or under what circumstances, promulgation of a plan amendment that favors participants, in whole or in part, should be given effect absent a plan procedure that complies with Section 402(b)(3), or even absent compliance with a plan-specified procedure. Statements by a plan sponsor to participants regarding the plan may, in some circumstances, create

the text or structure of the Act. Although the court was properly attentive to the rights of plan participants, it misapprehended the nature of the reliance interests at stake and failed to strike a fair balance, under the circumstances, between the competing interests of plan participants and plan sponsors. Thus, even if this Court agrees with the court of appeals that petitioner's plan violates Section 402(b)(3), this Court should not follow the court of appeals' approach regarding the consequences of the statutory violation. We urge the Court, instead, to adopt an approach, consistent with the language and structure of the Act, that is guided by traditional principles of trust law. We believe that approach will protect the legitimate interests of plan participants and beneficiaries without needlessly disrupting the operations of plans and plan sponsors.

1. Nothing in Section 402 of ERISA or in any other provision of the Act suggests that a plan amendment that complies with ERISA and with the terms of the underlying plan has no legal effect simply because the plan itself fails expressly to include an amendment procedure, in violation of Section 402(b)(3). To the contrary, the Act's directive that all plans be subject to amendment argues strongly against a rule of automatic invalidation. By way of analogy, it is well established that a formal, written plan in compliance with Section 402(a)(1) is not a prerequisite for ERISA coverage; rather, a plan exists if "from the surrounding circumstances a reasonable person c[an] ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits." *E.g.*, *Donovan* v. *Dillingham*, 688 F.2d 1367, 1372, 1373 (11th Cir. 1982) (en banc); *Gordon* v. *Barnes Pumps, Inc.*, 999 F.2d 133, 136 (6th Cir. 1993); *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503-1504 (9th Cir. 1985). By the same

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reliance interests that warrant enforcement irrespective of the formal effect of such statements on the plan.

token, the absence of a "named fiduciary," as required by Section 402(a)(1), does not mean that no one has fiduciary duties to the plan; it merely requires a court to consult the functional definitions of "administrator" and "fiduciary" in Sections 3(16) and (21), 29 U.S.C. 1002(16) and (21), to determine who does. And the absence of a stated "procedure for establishing and carrying out a funding policy and method," as required by Section 402(b)(1), does not excuse a plan sponsor from its duty to fund the plan or to pay promised benefits thereunder. By the same reasoning, the absence of an amendment procedure conforming to Section 402(b)(3) should not, alone, render a plan unamendable; it would be perverse to construe Section 402(b)(3) as a bar, when that Section's very purpose is to ensure that plans be susceptible to amendment. Cf. *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 507 (1993) ("It would make little sense to interpret directives designed to ensure the expeditious collection of revenues in a way that renders the Government unable, in certain circumstances, to obtain its revenues at all.").

When Congress intended to establish conditions precedent to plan amendment, it did so unequivocally. Thus, under Section 204(h), a defined benefit plan or an individual account plan subject to the funding standards of Section 302, 29 U.S.C. 1082, "may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to [affected participants, beneficiaries, and unions]." 29 U.S.C. 1054(h). Congress's demonstrated ability to articulate in the Act express conditions for the effectiveness of plan amendments weighs against the imposition of further conditions through judge-made rules. See *United States* v. *Shabani*, No. 93-981 (Nov. 1,

1994), slip. op. 5; *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 583 (1982).

Significantly, under Section 502(a)(3) of ERISA, a participant, beneficiary, or fiduciary may bring a civil action "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan" or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. 1132(a)(3). Because the Act thereby provides participants, beneficiaries, and fiduciaries with the ability to compel an otherwise recalcitrant employer to provide a definitive amendment procedure, there is no need to fashion a post hoc remedy of amendment invalidation to enforce compliance.[16]

2. Although the language and structure of the Act thus militate against the court of appeals' rule of per se invalidity, the Act itself provides no guidance for determining, in the absence of a plan-specified procedure, the circumstances under which a plan amendment should be given effect. Where the text of the Act provides no clear answer, this Court has turned for interpretive aid to established principles of trust law, in recognition of "ERISA's roots in the common law of trusts." *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063, 2068 (1993); see *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989); *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 156-157 (1985) (Brennan, J., concurring in the judgment).

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[16] Indeed, because plan fiduciaries are required to discharge their duties "in accordance with the documents and instruments governing the plan," 29 U.S.C. 1104(a)(1)(D), and are subject to suit under Section 502(a) for failure to do so, fiduciaries have a particular interest in being able to determine clearly the validity of plan amendments, and therefore have a strong incentive to compel employers to provide defined processes for amendment.

As several courts have recognized, the common law has developed principles for determining the effectiveness of a trust amendment when the settlor has reserved the power to amend but not specified in the trust instrument the method of modification.[17] Under those principles, the settlor may, in the absence of a specified procedure, exercise the power to amend in any manner that "sufficiently manifests his intention to modify the trust." *Restatement (Second) of Trusts* § 331 cmt. c (1959); compare G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 993, at 239 (rev. 2d ed. 1983) (power to amend may be exercised "in any reasonable manner"). To meet that test, the settlor must, by his action, indicate that he has reached a "definitive decision" to modify the trust, and that he is not merely contemplating taking some action in the future. *Restatement*, *supra*, § 330 cmt. i. Bogert suggests that "[n]otice of amendment to the trustee should be a requirement, since the modification will surely affect his duties." Bogert, *supra*, § 993, at 239-240 (footnote omitted); accord *Restatement*, *supra*, § 330 cmt. i.

We believe that standard should control: In the absence of a plan-specified amendment procedure, the law should give effect to an authorized act by a plan sponsor that clearly manifests the sponsor's intention to amend the plan. If challenged, the sponsor should, at a minimum, be required to demonstrate that it acted in a definitive manner, as prescribed by otherwise applicable law, such as state corporate law (as suggested by Judge Roth), the corporation's own by-laws, the requirements of the Labor Management Relations Act for multiemployer plans, and/or any applicable plan documents. In accordance with established law (and consistent with the need for a clear manifestation of intent), the amendment should be set forth in a formal writing and be provided to plan

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[17] See, *e.g.*, *Biggers* v. *Wittek Indus., Inc.*, 4 F.3d at 295; *Murphy* v. *Keystone Steel & Wire Co.*, 850 F. Supp. at 1382.

fiduciaries.[18] We believe that these principles provide a reasonable, tested standard that is consistent with the purposes of the Act and attentive to the legitimate interests and expectations of the affected parties.

3. The Third Circuit's rule of per se invalidity is both at odds with the goals of ERISA and out of step with the reasonable expectations and interests of the parties. The court of appeals justified the rule as necessary to "provide[] certainty and protect[] participants against frustration of their legitimate expectations." Pet. App. 10a. Although the court was rightly solicitous of the interests of the plan participants, it seems to have given no thought to their ability under Section 502(a)(3) to compel compliance with the Act. Moreover, its cure was worse than the disease. By creating the potential in all cases for retroactive invalidation, the court's rule deprives participants of their ability "to rely upon the plan document as defining the benefits currently being provided." Pet. App. 10a. It thereby eliminates the certainty Congress sought to achieve through Section 402(a)(1)'s written instrument requirement and frustrates the very interests the Third Circuit sought here to vindicate.

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[18] In general, an oral or informal written communication is ineffective to amend the terms of a written plan. See *Coleman* v. *Nationwide Life Ins. Co.*, 969 F.2d 54, 58-59 (4th Cir. 1992), cert. denied, 113 S. Ct. 1051 (1993); *Cefalu* v. *B.F. Goodrich Co.*, 871 F.2d 1290, 1295-1297 (5th Cir. 1989); *Moore* v. *Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988); *Straub* v. *Western Union Telegraph Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988); *Nachwalter* v. *Christie*, 805 F.2d 956, 960 (11th Cir. 1986). Some courts have, however, applied principles of estoppel to enforce informal attempts to amend when the failure to do so would upset employees' reasonable expectations. See, *e.g.*, *Black* v. *TIC Inv. Corp.*, 900 F.2d 112, 114-115 (7th Cir. 1990) (collecting cases); but see, *e.g.*, *Miller* v. *Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992) (refusing to apply estoppel, on the ground that Section 402(a)(1)'s written instrument requirement precludes reasonable reliance on any oral communication that conflicts with the terms of the written plan), cert. denied, 113 S. Ct. 1586 (1993).

The systemic uncertainty engendered by the Third Circuit's rule is not justified by any substantial threat to the interests of plan participants and beneficiaries. In circumstances when, as here, a plan expressly mentions the possibility of amendment and gives the right to amend to an identified person, the rule of automatic invalidation bears no relationship to any harm actually or even potentially caused by the violation of Section 402(b)(3). In this case, for example, the harm to respondents—loss of retiree health benefits—was caused entirely by the substance of the plan amendment, not by the manner in which it was adopted. The plan itself put participants on notice that petitioner could amend it, in whole or in part, at any time. No participant who actually read that amendment language could have had any legitimate expectation that the plan could never be amended. Nor does there appear to be any record evidence that petitioner would have made a different decision about terminating respondents' benefits if the plan documents had contained a more detailed procedure. It is difficult to justify the invalidation of a clearly announced modification that the plan sponsor had every right to make in the absence of a statutory or plan prohibition against the manner of amendment or of any articulable harm,[19] particularly in light of the "tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs," *Mertens* v. *Hewitt Associates*, 113 S. Ct. at 2072.

The court of appeals justified its decision, in addition, on the ground that it would be somehow unfair to treat this case differently from cases in which the sponsor has set forth a procedure and not followed it. Since amendments adopted in a manner contrary to a plan's own amendment procedure are

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[19] Cf. *Carey* v. *Piphus*, 435 U.S. 247 (1978) (refusing to grant substantive relief for a violation of procedural due process that caused no actual harm).

generally held to be ineffective to alter the terms of the plan,[20] the court reasoned that the same result should obtain where the plan has no amendment procedure at all; otherwise, those who violate Section 402(b)(3) would be in a better position than those who comply with it. Pet. App. 10a-11a. The two circumstances, however, raise distinct concerns under the Act, are treated differently under the law of trusts, and involve disparate reliance issues.

In the absence of a plan-specified procedure for amendment, the manner in which an amendment is promulgated cannot be said to violate the terms of the plan. The same cannot be said, however, for an amendment promulgated in a manner contrary to that set out in a plan-specified procedure. In the latter circumstance, the plan itself creates a condition precedent—promulgation through the stated procedure—to effectiveness of a plan amendment. An amendment promulgated without satisfying that condition precedent is ineffective under the express terms of the plan, and administration of a plan in accordance with an ineffective amendment is prohibited by Section 404(a)(1)(D), which requires that a plan be administered "in accordance with the documents and instruments governing the plan." 29 U.S.C. 1104(a)(1)(D).

Treating the two circumstances differently is consistent, as well, with their treatment under the common law. Under established trust principles, a settlor who reserves the power to revoke or modify a trust only in a particular manner or under particular circumstances may revoke or modify the trust only in that manner or under those circumstances. See

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[20] See, *e.g.*, *Elmore* v. *Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994) (en banc); *Miller* v. *Coastal Corp.*, 978 F.2d at 624; *Albedyll* v. *Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 254-255 (7th Cir. 1991); *Grun* v. *Pneumo Abex Corp.*, 808 F. Supp. 632 (N.D. Ill. 1992); *Siskind v. Sperry Retirement Program*, 795 F. Supp. 614, 617-618 (S.D.N.Y. 1992).

Restatement, supra, § 330 cmt. j; *id.* § 331 cmt. d.[21] Under ERISA, as under the law of trusts, determining the validity of an amendment with reference to the procedural limitations set forth in the plan documents gives effect to the manifested intent of the sponsor and fulfills the reasonable expectations of the parties.[22]

Finally, the court of appeals' perverse incentives argument lacks force under its own terms. Assuming that an employer might prefer to forgo providing any procedure for amendment (to avoid the risk that a procedural gaffe might invalidate a desired plan amendment), the employer can be enjoined by any interested fiduciary, participant, or beneficiary to comply with Section 402(b)(3), irrespective of that preference. 29 U.S.C. 1132(a)(3).

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[21] Some courts have, in practice, exercised discretion to give effect to trust amendments despite slight procedural irregularities. *E.g., In re Florance*, 343 N.W.2d 297, 301 (Minn. Ct. App. 1984), aff'd in part, rev'd in part on other grounds, 360 N.W.2d 626 (Minn. 1985); *Woodward* v. *Ameritrust Co.*, 751 F.2d 157, 160-161 (6th Cir. 1984). We would be similarly inclined, under those circumstances, to honor substantial compliance with plan procedures. Cf. *Aronson* v. *Servus Rubber, Division of Chromalloy*, 730 F.2d 12, 14-16 (1st Cir.) (giving effect to substantial compliance with specified plan termination procedures), cert. denied, 469 U.S. 1017 (1984).

[22] If the Court determines that petitioner's plan provides a procedure for amendment conforming to the requirements of Section 402(b)(3), the issue will shift on remand to whether petitioner followed that procedure (including conformity with background requirements of state corporation law for petitioner to take effective action) when it promulgated the subject amendment.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,

Petitioner,

V.

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

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CURTISS-WRIGHT CORPORATION,

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FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The National Union Fire Insurance Company of Pittsburgh, PA ("National Union") is one of the largest underwriters in the United States of insurance covering certain liabilities arising from claims under the Employee Retirement Income Security Act of 1974 ("ERISA"). National Union has issued a policy which covers certain ERISA-related liabilities of petitioner Curtiss-Wright Corporation ("Curtiss-Wright"). In addition, National Union has issued similar policies to well

over a thousand other employee benefit plan sponsors which may be exposed to liability if the decision below is not reversed. National Union therefore has a substantial interest in the outcome of this case. Moreover, the uncertainty engendered by the decision below as to the validity of current terms of employee benefit plans makes it more difficult for National Union to underwrite policies of insurance that cover ERISA-related liabilities. Unless the decision below is reversed, this difficulty will either increase the cost or restrict the availability of such insurance, thus harming the companies that sponsor employee benefit plans and making it less likely that they will continue to provide such plans.[1]

SUMMARY OF ARGUMENT

The Court of Appeals held that Curtiss-Wright had expressly reserved its power to make amendments to its employee welfare benefit plan. The court also held, however, that a plan amendment eliminating plaintiffs' retiree health benefits was invalid because, in the court's view, the plan lacked an amendment procedure which satisfied § 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3).

Section 402(b)(3) does not require the detailed amendment procedure envisioned by the Court of Appeals. To the contrary, all § 402(b)(3) requires is that plan sponsors which want to maintain their power to amend plans reserve the

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[1] This brief is filed with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court with this brief.

power to do so, thus alerting plan participants that future amendments could modify their current benefits. The statutory purpose identified by the Court of Appeals of ensuring that all parties involved with an employee benefit plan be able to determine the plan's terms with certainty is already amply served by § 402(a)'s requirement that the plan be maintained in writing and is frustrated by the court's holding invalidating the written terms of an amended plan.

Even if the Court of Appeals were correct in its reading of § 402(b)(3), the remedy it upheld -- an award of the very benefits intended to be eliminated by the plan amendment -- is unwarranted. Regardless of how the perceived violation of § 402(b)(3) is characterized, it did not, by itself, detrimentally affect participants whose benefits would still have been eliminated even if the plan had fully complied with the court's reading of § 402(b)(3). The appropriate result when a procedural violation relating to an amendment has occurred is, as trust law principles provide, to give effect to the amendment where, as here, the sponsor's intent to amend has been clearly manifested and the amendment is not prohibited by the plan instrument.

Because the Court of Appeals erred both in finding a violation of § 402(b)(3) and in awarding a substantive remedy for such a violation, its judgment to that effect should be reversed.

ARGUMENT

I. Curtiss-Wright Did Not Violate § 402(b)(3) of ERISA

This litigation arose from Curtiss-Wright's decision, announced in November 1983, to close a plant in Wood-Ridge, New Jersey. (Pet. App. 3a.) Consistent with the terms of its health benefit plan for retirees, as set out in a 1983 Summary Plan Description ("SPD"), health benefits for non-bargaining unit employees who had retired from the Wood-Ridge plant were discontinued once the plant closed. (Pet. App. 4a-6a.) This lawsuit followed.

The District Court held that the 1983 SPD constituted an amendment to Curtiss-Wright's plan (Pet. App. 36a) and this issue was not presented to the Court of Appeals. Although the Court of Appeals held that Curtiss-Wright had reserved the power to make such an amendment and it was undisputed that this amendment was in writing, the court held that the amendment was unenforceable because the Curtiss-Wright plan lacked an amendment procedure as required by § 402 (b)(3) of ERISA. (Pet. App. 10a, 13a-14a.)

Section 402(b)(3) states:

> (b) Every employee benefit plan shall . . .
>
> > (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan.

The Court of Appeals held that Curtiss-Wright had expressly reserved its power to amend the plan by stating in various documents, including the Constitution that served as an umbrella document for all of Curtiss-Wright's benefit plans,

that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." (Pet. App. 4a.) The court held, however, that the Curtiss-Wright plan lacked the amendment procedure required by § 402(b)(3), thus rendering the 1983 amendment unenforceable. (Pet. App. 11a.) The court concluded that the reservation clause in the Constitution satisfied neither of the two requirements of § 402(b)(3), *i.e.*, that the plan provide an amendment procedure and a procedure for identifying the persons with authority to make amendments. (Pet. App. 7a-8a.)

As to the second of these requirements, the court clearly erred by holding that identification of the "Company" was not a sufficient identification of "persons" with amendment authority. (Pet. App. 8a.) Section 3(9) of ERISA, 29 U.S.C. § 1002(9), expressly defines the term "person" to include a "corporation" and other entities in addition to an "individual." Thus, Curtiss-Wright was not, as the court suggested, required by § 402(b)(3) to identify the actual "individuals or bodies within the Company" (Pet. App. at 8a) who would make the amendment decision for the "Company."[2] Its designation of the "Company" was sufficient to comply with the statute.

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[2] In a variety of other contexts, courts have recognized what § 3(9)'s language makes plain, *i.e.*, that a "person" need not be an "individual." *See, e.g.*, *Confer v. Custom Eng'g Co.*, 952 F.2d 34, 36 (3d Cir. 1991) (corporation is a "person" for purposes of ERISA under § 3(9)); *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 960 (1st Cir. 1989); *Scarbrough v. Perez*, 870 F.2d 1079, 1082 (6th Cir. 1989).

As to the first requirement of § 402(b)(3) -- that the plan "provide a procedure for amending such plan" -- the reservation of amendment power in the Constitution was also sufficient. Placing the amendment power in the "Company" by itself creates an amendment procedure, *i.e.*, that the "Company" would take whatever corporate actions were necessary in order to exercise its amendment authority. While an amendment procedure may spell out those steps if the plan's sponsor so desires, nothing in ERISA suggests a reason why § 402(b)(3) must or should be read to require such detail.

A procedure is "[a] manner of proceeding; a way of performing or effecting something." *American Heritage Dictionary of the English Language* 1444 (3d ed. 1992). Without question, Curtiss-Wright had a "procedure" in this sense for amending its plan. Curtiss-Wright "proceeded" to amend its plan by having the amendment approved by company officials and inserted in the written document governing the plan. This procedure was based on and bounded by two different sets of legal requirements: the state corporate law requirement that the "Company" act in an authorized manner sufficient to bind the corporation and ERISA's requirement, contained in § 402(a), that amended plan terms, like all other plan terms, be incorporated in the written instrument pursuant to which the plan is established and maintained. By authorizing the "Company" to amend the plan, the plan Constitution necessarily required that the Company act in an authorized fashion and effect its amendments in writing.

The Court of Appeals rejected this construction of § 402(b)(3) on the grounds that it would render the "require-

ments of § 402(b)(3) essentially meaningless."[3] (Pet. App. 8a.) That conclusion, however, rested entirely on the court's assumption that "[a] primary purpose of § 402(b)(3) is to ensure that all interested parties will know how a plan may be altered. . . . Only if they know this information will they be able to determine with certainty at any given time exactly what the plan provides." *Id.*

In divining this "primary purpose" of § 402(b)(3), the court cited to no authority in the statute, legislative history, or elsewhere evidencing such a purpose. Obviously, the written plan requirement of § 402(a) serves the statutory purpose associated by the court with § 402(b)(3) of letting "all interested parties . . . determine with certainty at any given time exactly what the plan provides." (*See* Pet. App. 8a.) Indeed, the court's phrasing of this statutory purpose tracks closely the legislative history's description of § 402(a), not § 402(b)(3), as permitting an employee to "determine exactly

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[3] The court's conclusion dealt inconsistently with the two requirements of § 402(b)(3). As to the second of these requirements -- that the plan "provide a procedure . . . for identifying the persons who have authority to amend the plan" -- the court apparently concluded that it would have been sufficient to specifically identify the persons with amendment authority without also setting forth separately a written "procedure" for such identification. As to the first requirement, however, the court found it insufficient that Curtiss-Wright actually engaged in a process that produced a written amendment and required that this process be described in a written "procedure".

what his rights and obligations are under the plan."[4] Recognizing the importance of certainty to all "interested parties" -- i.e., to plan sponsors and administrators as well as plan participants and beneficiaries -- the lower courts have consistently held that plan benefit entitlements must be determined solely under the terms of the plan.[5]

The lower court's interpretation of § 402(b)(3), however, disserves, not advances, this statutory purpose of certainty as it casts doubt on the reliability of the written plan instrument. Rather than looking solely at the plan's provisions, interested parties would have to investigate further to determine which provisions had resulted from amendments and whether each amendment had been promulgated in compliance with the plan's amendment procedure. As to any amendments

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[4] H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 297 (1973) (hereinafter "Conference Report"), *reprinted in* 3 Senate Subcomm. on Labor, Legislative History of ERISA 4518, 4564 (Comm. Print 1976) (hereinafter "Legislative History") *and in* 1974 U.S. Code Cong. & Admin. News 5038, 5077-78.

[5] *See, e.g., Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1295-97 (5th Cir. 1989); *Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1149 (7th Cir. 1989); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986). The sole exception recognized by some courts is where a participant has reasonably relied to his or her detriment on some authoritative statement not contained in the written plan. *See, e.g., Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163-64 (6th Cir. 1988) (affirmative misstatements made by corporate sponsor and relied upon by participants may entitle participants to those benefits). This Court need not address any of these grounds, which are not at issue before the Court.

revealed to be the product of a defective procedure, the question would then have to be resolved whether the amendment was, in the phrase used by the court below, "advantageous to the sponsor's interest" (Pet. App. 11a, n.5), and thus unenforceable, or whether it fell into some other category that perhaps rendered it enforceable despite its procedural deficiency.[6] Thus, the court's reading of § 402(b)(3) actually undermines the certainty purpose embodied in § 402(a).

The importance of § 402(a)'s requirement that a plan be maintained in writing is confirmed by ERISA's provisions requiring disclosure to plan participants. While Curtiss-Wright followed the not uncommon practice of letting a single document do double duty as both an SPD and a plan document, many plans publish SPDs that are separate from, and merely summarize, the more detailed terms of the plan instrument created in compliance with § 402(a).[7] Only the

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[6] The Court of Appeals' attempt to limit its holding to amendments "advantageous to the sponsor's interest" has no basis in the statute and is itself meaningless. All plan amendments, even ones that increase benefits, are presumably "advantageous" to the sponsor, or the sponsor would not make the amendment. Moreover, it is common for plan amendments both to simultaneously improve and restrict benefits and to affect different participants differently. For example, an amendment implementing a preferred provider network may provide greater benefits to participants who use network providers while increasing deductibles and copayments for other participants who choose not to use the network.

[7] Although §§ 102(a)(1) and (b) contemplate that the SPD will be a readable summary of the plan's provisions, nothing in ERISA precludes a plan from combining the plan instrument and SPD into a single document.

SPD, not a separate plan document, is required to be distributed to participants. *See* § 104(b)(1), 29 U.S.C. § 1024(b)(1). Moreover, although plan administrators are required to distribute updated SPDs every five years to reflect plan amendments and summaries of material modification ("SMMs") more frequently to reflect material plan changes (*see* §§ 102(a)(1), 104(b)(1)), the required distribution need not be made simultaneously with the plan modifications. To the contrary, balancing the participants' need for disclosure with the cost burdens on plan sponsors, Congress enacted § 104 of ERISA which requires only that SMMs be distributed within 210 days after the end of the plan year in which the modification was made. *See* § 104(b)(1).[8] Thus, to take the extreme case, a plan amendment made effective at the beginning of one plan year need not be disclosed in an SMM until nineteen months later; even for a year-end amendment, a seven-month delay could ensue.

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[8] Because ERISA does not require employers to provide *any* benefit plans, Congress balanced its desire to regulate plans extensively against the danger that increased regulation would deter employers from creating plans in the first place. Although ERISA was clearly "designed to promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983), the statute was also drafted to "minimize[ ]" the "adverse impact" of "cost increases" imposed on employers by the tougher regulation. H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 1, *reprinted in* 2 Legislative History 2348 *and in* 1974 U.S. Code Cong. & Admin. News 4639. Thus, Congress analyzed "all of the provisions in [ERISA] . . . on the basis of their projected costs in relation to the anticipated benefit to the employee participant." *Id.* at 4639-40.

Most employers, of course, do not operate their businesses by keeping employees in the dark about significant changes affecting their benefits. ERISA's provisions, in any event, protect against such conduct. The statutory provisions which primarily ensure that participants have access to contemporaneous information about plan terms without any gap resulting from delayed distribution of an SPD or SMM are § 104(b)(2) and § 402(a). Section 104(b)(2) requires that the plan administrator make available for inspection by participants certain specific documents, including "instruments under which the plan was established or is operated."[9] Because § 402(a) requires that the plan terms be reflected in a written instrument, those terms are available to participants for contemporaneous inspection under § 104(b)(2).[10] The purpose identified by the Court of Appeals as "a primary purpose" of § 402(b)(3) is instead fully served by the combination of § 402(a) and § 104(b)(2). Or, as the legislative history of § 402(a) phrases it: "A written plan is to be

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[9] In addition, § 104(b)(4) requires a plan administrator, upon written request of any participant or beneficiary, to furnish a copy of these same documents or else risk penalties for noncompliance in an action brought under § 502(c)(1).

[10] Despite § 402(a)'s singular reference to a plan "instrument," § 104(b)(2) makes clear that there may be multiple "documents" and "instruments" governing a plan. *See also* § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) ("a fiduciary shall discharge his duties . . . in accordance with the documents and instruments governing the plan"). Once a written plan amendment is effected it becomes such a governing document; even if it has not yet been incorporated into a restated plan document, it is available for inspection under § 104(b)(2).

required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." Conference Report at 297.

Section 402(b)(3) does not add significantly to the protection afforded participants under § 402(a). To be sure, some disclosure function may be served by spelling out in the plan instrument exactly what steps a sponsor must follow in order to amend a plan and alerting participants who are searching for amendments that have not yet been incorporated into written plan instruments, SPDs or SMMs exactly what form the written amendment took. The benefit of such disclosure is slight, if any, since under § 104(b)(2) the participant can already examine the written plan terms, including the amendment. Moreover, the details of how a corporation goes about amending a plan is not information which participants are likely to find useful. The lower courts have consistently held that employers, even if they otherwise occupy fiduciary positions in the administration of plans, do not act as fiduciaries when they amend a plan; rather, like the settlor of a trust, they are free to design and amend plans in their own interests as long as the terms do not violate any other provisions of ERISA or other federal law.[11] Given the

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[11] *See, e.g., Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994) ("an employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, and thus cannot violate its fiduciary duty, provided that . . . the amendment does not otherwise violate ERISA or the express terms of the plan," citing *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160-61 (3d Cir. 1990) (emphasis omitted)); *Musto v. American Gen. Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Amato v. Western Union Int'l, Inc.*, 773 F.2d

lack of a fiduciary-beneficiary relationship arising from the plan amendment process, there is no obvious reason why plan participants would want to know the details of an amendment procedure in which they play no part, as long as they know the result.

Indeed, the conclusion that participants do not need to know the details of a plan's amendment process was shared by the drafters of the statutory and regulatory disclosure requirements. Section 104(b) imposes a requirement on a plan administrator to prepare and distribute both a plan description and an SPD.[12] Notably, none of the information required by the statute to be disclosed in these documents relates to a plan's amendment procedure. Likewise, although the implementing regulation promulgated by the Department of Labor provides for even greater and more detailed types of disclosure, the information described in § 402(b)(3) relating to the plan amendment procedure is not among the items required to be disclosed. *See* 29 C.F.R. § 2520.102-3.

1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986).

[12] Section 102(b) contemplates the preparation of a plan description and a summary plan description containing identical information. Both documents are required to be filed with the Secretary of Labor (*see* §§ 104(a)(1)(B), (C)), but only the SPD is distributed to participants (*see* § 104(b)(1)). Recognizing the substantial duplication between the plan description and SPD, the Department of Labor has granted regulatory relief which permits both requirements to be satisfied by a single document, which is generally referred to as an SPD. *See* 29 C.F.R. § 2520.104a-2.

Given the absence of express disclosure requirements relating to § 402(b)(3), it is not surprising that model plan documents widely used by employee benefit practitioners, including prototype plan documents published by the Internal Revenue Service, contain amendment language essentially identical to that in the Curtiss-Wright plan Constitution.[13]

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[13] *See* Pet. at 8-9; Amicus Brief of the National Union Fire Insurance Company of Pittsburgh, PA in Support of the Petitioner at 9. Likewise, numerous judicial decisions have involved amendments of plans which contain similar language without suggesting that this language did not satisfy § 402(b)(3). *See, e.g., Gable v. Sweetheart Cup Co.*, 1994 U.S. App. LEXIS 25008, *5 (4th Cir. Sept. 13, 1994) ("Maryland Cup Corporation reserves the right to modify, change or terminate the medical coverage for retirees at any time in the future"); *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 135 (6th Cir. 1993) ("the Company reserves the right to modify, suspend or terminate the Plan, at any time and for any reason"); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 933 (5th Cir.) ("[t]he Company reserves the right to alter, amend, delete, cancel or otherwise changes the plan or any of the provisions of the plan at anytime [sic]"), *cert. denied*, 114 S. Ct. 196 (1993); *Musto v. American Gen. Corp.*, 861 F.2d at 903 ("the Company does, as it always has, reserve the right to change the Plan and, if necessary, discontinue it"); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 490 (2d Cir. 1988) ("[t]he Company reserves the right at any time to change or discontinue this [plan]"); *In re White Farm Equipment Co.*, 788 F.2d 1186, 1189 (6th Cir. 1986) ("the Company does reserve the right to change the plans, and, if necessary, discontinue them"); *Amato v. Western Union Int'l, Inc.*, 773 F.2d at 1418 ("the Company does reserve the right to change or even terminate the Plan"); *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 18 Employee Benefits Cas. (BNA) 1257, 1274 (E.D. Pa. 1994) ("[t]he Company reserves the right to amend or terminate this Plan at any time in its sole discre-

Thus, the language used by Curtiss-Wright does not represent some unique instance of careless plan drafting but is instead a formulation of the amendment power that is commonly in use throughout the country.

The fact that plan amendments are so common itself suggests two other purposes for § 402(b)(3), both of which were served by Curtiss-Wright's language. First, the presence of such language in a plan document at least alerts participants to the possibility that an amendment can be made by "the Company," thus simultaneously warning them, in the case of welfare benefits, that those benefits are not vested and alerting them that they may wish to examine all plan documents in order to determine their current rights with certainty. Second, it ensures that the plan sponsor has retained, unless it chooses not to do so, the power to make amendments to the plan.

As this Court has noted, ERISA "abounds with the language and terminology of trust law," *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), and many

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tion"); *Bongiorno v. Associates in Adolescent Psychiatry*, 17 Employee Benefits Cas. (BNA) 1847, 1848 (N.D. Ill. 1993) ("[t]he corporation reserves the right to change any policy or benefit"); *Carroll v. Primerica Financial Servs. Ins. Marketing*, 811 F. Supp. 1558, 1560-61 (N.D. Ga. 1992) ("[t]he Corporation reserves the right to modify, revoke, suspend, terminate, or change any or all policies and procedures, in whole or in part, at any time, with or without notice"); *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1187 (S.D. Tex. 1991) ("[t]he Company reserves the right to modify or amend the Plan, in whole or in part"), *aff'd sub nom. Borst v. Chevron Corp.*, 1994 U.S. App. LEXIS 19473 (5th Cir. Oct. 21, 1994).

ERISA provisions are drawn from trust law concepts. *Id.*; *see also Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-71 (1985). Section 402(b)(3) is one of those provisions. At trust law, a settlor of a trust has power to modify the trust only to the extent that power is reserved in the trust instrument. *See* Restatement (Second) of Trusts § 331(1) (1959). Section 402(b)(3) requires a specification of that amendment power and of any limits placed on that power.[14] The twenty years since ERISA's enactment have demonstrated the wisdom of retaining amendment flexibility as employers have scrambled to amend their plans to comply with waves of new legislation[15] and to adjust to economic forces such as the

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[14] Indeed, although the legislative history of § 402(b)(3) is scant, it also suggests a Congressional concern that flexibility to amend be preserved. The House version of the bill that went into Conference and became ERISA gave a plan administrator authority to amend a plan "(except with respect to contribution rates) where such an amendment is necessary to meet the requirements of this title or where such an amendment is necessary to protect the interests of the participants." H.R. 2 (as passed in House), 93d Cong., 2d Sess. § 111(a)(1) *reprinted in* 3 Legislative History 3898, 3947-48. Although the concept of having a fiduciary make amendments disappeared in the final bill, § 402(b)(3) evidences the concern to preserve amendment power.

[15] *See* Human Resources Div., U.S. General Accounting Office, *Retiree Health Plans: Health Benefits Not Secure Under Employer-Based System* 5 (93-125) (1993) (hereinafter "1993 GAO Report"); *see also ERISA: The Law and the Code* v-ix (Paul F. Albergo ed., 1994).

national explosion in health care costs.[16] A principal purpose served by § 402(b)(3) under these circumstances has been the inclusion in plans of provisions reserving amendment rights on behalf of plan sponsors and disclosing to participants that amendments may occur.[17]

In short, a holding that Curtiss-Wright's amendment language was in compliance with § 402(b)(3) would give meaning to the provision by recognizing the purposes it serves, not render it meaningless. The conclusion reached by the court below, in contrast, is not required by the language of § 402(b)(3), does not serve the certainty purpose identified by the court, and renders unlawful plan provisions that have been widely used and endorsed by the Internal Revenue Service and treated as effective by numerous other courts since the enactment of ERISA in 1974. Accordingly, it should be reversed by this Court.

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[16] *See* 1993 GAO Report at 12-16; *see also* Human Resources Div., U.S. General Accounting Office, *Employer-Based Health Insurance: High Costs, Wide Variation Threaten System* 4 (92-125) (1992).

[17] "In general, employers may make changes in their plans as long as they have reserved the right to do so. According to the benefit consultants we contacted, virtually all employers have reserved their right, in some fashion, to change their health benefit plans." 1993 GAO Report at 6.

II. Assuming *Arguendo* That § 402(b)(3) Was Violated, the Remedy Chosen by the Court Below Was Not Warranted

Assuming *arguendo* that the Court of Appeals was correct in determining that a violation of § 402(b)(3) occurred, the remedy awarded -- a declaration that the plan amendment promulgated by Curtiss-Wright was unenforceable and, consequently, that plaintiffs were entitled to benefits under the pre-amendment plan -- was unwarranted for several reasons.

First, as discussed *supra* at p. 7, the real criticism made by the Court of Appeals was not that Curtiss-Wright lacked some "procedure", *i.e.*, "manner of proceeding" to amend its plan document; a method did exist by which the amendment was accomplished. Rather, the perceived defect was that this procedure was not spelled out to the court's satisfaction in the written instrument required under § 402(a). It is difficult to imagine that an award of benefits would be the appropriate remedy for the failure of a plan to comply with any of the other provisions required or permitted by other subsections of § 402(b), *i.e.*, a funding policy (§ 402(b)(1)), an allocation of fiduciary responsibilities (§ 402(b)(2)), or a specification of the basis of payments made to a plan (§ 402(b)(4)). The same should be true as to a violation of the remaining subsection, § 402(b)(3).

Even if the violation of § 402(b)(3) is characterized as the failure to have a "procedure," not merely to set forth the procedure in writing, an award of benefits is still not the appropriate remedy. Courts have consistently refused to award substantive remedies for "procedural" violations,

especially where no substantive harm or detrimental reliance had resulted from the procedural failure.[18] Here, there is no claim that a failure to have an amendment procedure itself caused any harm to participants; if the procedure had fully complied with the court's conception of § 402(b)(3), the participants would have been in no better, or even different, situation than resulted from the actual amendment process used by Curtiss-Wright. The 1983 amendment would still have eliminated their benefits.

Moreover, the award of a substantive remedy cannot be justified by the statutory purpose of § 402(b)(3) as identified by the Court of Appeals. Far from producing certainty, the lower court's remedy would presage a litigator's dream and a practical nightmare for all of the parties connected to employee benefit plans. Participants and beneficiaries could never rely on a plan's terms as describing their benefit entitlements. Given the frequency with which employee benefit plans have been amended in response to statutory changes and other concerns (*see supra* notes 15, 16), they would be foolish to do so.

Plan sponsors could presumably deal prospectively with the decision below by formalizing and particularizing their

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[18] *See, e.g., Lewandowski v. Occidental Chemical Corp.*, 986 F.2d 1006, 1008-09 (6th Cir. 1993); *Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 743 (7th Cir. 1992); *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990); *Simmons v. Diamond Shamrock Corp.*, 844 F.2d 517, 524-25 (8th Cir. 1988); *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618, 621-22 (7th Cir. 1987).

plan amendment procedures.[19] They could not, however, fix the past; even if a plan's amendment procedure were immediately brought into conformance with the lower court's interpretation of § 402(b)(3) and a plan were immediately restated to ratify all past amendments, benefit claims arising from events prior to such restatement would be determined under the pre-restated plan. Thus, the enforceability of many existing plan terms is placed in doubt by the decision below and can only be resolved through the litigation which, given that billions of dollars of benefits are potentially at stake, would inevitably ensue. The unanticipated costs of providing past benefits which employers thought had been modified or eliminated by plan amendments now deemed to be ineffective under the decision below would be staggering, not to mention the concomitant legal and administrative expenses to be suffered by corporations, large and small.

Moreover, by holding that Curtiss-Wright's amendment language was inadequate to effect an amendment, the decision below provides an obvious litigation route to avoid Congress' intent that welfare benefits do not vest. *See* § 201(1), 29 U.S.C. § 1051(1) (ERISA's vesting requirements do not apply to employee welfare benefit plans). Congress declined to require vesting of welfare benefits,

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[19] A large portion of the employee benefit plan universe, however, involves insured plans in which the plan sponsor's role in amending the plan is usually limited. Typically, the insurance policy itself as issued by the insurer is the only plan instrument, and the plan is amended via a written policy endorsement from the insurer which is accepted by the employer's payment of a premium. Exactly how these plans would cope with the decision below is another mystery that would only be resolvable through litigation.

recognizing that this requirement "would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 60, *reprinted in* 2 Legislative History 3180 *and in* 1974 U.S. Code Cong. & Admin. News 4670, 4726. Instead, Congress intended employers to be free to create, modify, or terminate the terms and conditions of welfare benefit plans as inflation, changes in medical practice and technology, and the costs of treatment dictate. *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d at 492; *see also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985) (ERISA "does not regulate the substantive content of welfare-benefit plans"). Lower courts have uniformly recognized this principle, refusing to vest welfare benefits in the absence of an intent to do so. *McGann v. H. & H. Music Co.*, 946 F.2d 401, 405-07 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d at 1160.

Also at risk from the decision below, but for different reasons, would be the fiduciaries charged with plan administration who owe statutory duties to act in accordance with plan terms (*see* § 404(a)(1)(D)) but also to act "solely in the interest" of plan participants and beneficiaries (*see* § 404(a)(1)). Like the other interested parties, they too would need to examine more closely the procedural propriety of past plan amendments and perhaps take affirmative steps

to establish the validity of plan provisions through actions for declaratory relief.[20]

These effects on plan parties are not the product of a doomsday scenario but are readily predictable. As litigation explodes and benefit costs surge, employers would, as they have in the past, react by cutting benefits and their attendant costs in other respects.[21] Thus, while past participants and beneficiaries might gain unanticipated benefits from the decision below, future participants and beneficiaries would pay for those benefits, as well as their attendant litigation and other expenses. Certainty in plan administration and elimination of unnecessary expenses that discourage employers from maintaining plans -- two recognized objectives of the Congress that enacted ERISA -- would be among the casualties.

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[20] This course of action itself is not without uncertainty. Although, as this Court noted in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108 (1989), § 502(a)(1)(B) of ERISA allows a participant or beneficiary to sue "to obtain a declaratory judgment of future entitlement to benefits under the provisions of the plan contract," a number of lower courts have held that ERISA does not authorize a cause of action by a fiduciary for such relief. *See Transamerica Occidental Life Ins. Co. v. DiGregorio*, 811 F.2d 1249, 1252-53 (9th Cir. 1987); *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1523 (11th Cir. 1987) ("Gulf Life's declaratory judgment action simply is unnecessary to further the statute's purpose"); *Reynolds v. Stahr*, 758 F. Supp. 1276, 1280-81 (W.D. Wis. 1991).

[21] *See* 1993 GAO Report at 3 & App. II.

The court below also justified its remedy by a perceived need to deter violations of § 402(b)(3). Thus, the court stated that not to award a substantive remedy "would place those who violate § 402(b)(3) by including no procedure for amendment in a plan in a better position than those who comply with that requirement and would thereby discourage employers from complying with § 402(b)(3)." (Pet. App. 11a.) If, however, deterrence is the remedial goal, it is ill-served by an award of benefits in this case since there is no need to deter an employer which adopted a plan amendment provision endorsed by the IRS and commonly used by other employers.

Moreover, the court's distinction between non-complying employers who require a deterrence remedy and complying employers who do not is a misleading one. Rather, as the court's discussion makes clear, its comparison is between employers which do not have an amendment procedure that satisfies § 402(b)(3) and employers which have a satisfactory procedure but then fail to comply with it. These latter employers have not violated § 402(b)(3) but instead have violated the terms of the plan. Thus, the distinction in remedy identified by the Court of Appeals relates to non-complying employers in two different circumstances. As discussed below, however, that distinction is a logical one, well-recognized in trust law.

Under trust law, a settlor has the power to modify the trust if and to the extent that he reserved such a power by the terms of the trust. If the settlor does not by the terms of the trust reserve a power to alter or amend or modify it, he has no power to do so. Restatement (Second) of Trusts § 331.

The settlor may reserve a power to alter the trust in any way he sees fit, or he may reserve a power to modify it only in some particular way. If the settlor reserved the power to modify the trust using only a particular method, or placed any other limitation on the right to amend, those restrictions must be obeyed; any attempt to modify the trust which exceeds the limitations placed on the amendment power by the terms of the trust will be deemed a nullity. *See id.* cmt. d. This rule has been carried over into ERISA by decisions holding that amendments made in violation of plan terms are ineffective. *See Albedyll v. Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246, 255 (7th Cir. 1991); *Frank v. Colt Indus., Inc.*, 910 F.2d 90, 98 (3d Cir. 1990).

This case, however, does not involve a violation of limits placed on a plan's amendment procedure by the terms of the plan itself. At trust law, where the settlor reserved a power to amend and placed no limits on that power, the power is considered unlimited and may be exercised by any method which sufficiently manifests an intention to modify the trust. *See* Restatement (Second) of Trusts § 331 cmt. c. This rule too has been recognized in ERISA cases in which courts have upheld amendments clearly intended by a plan sponsor but made to plans which, much more clearly than in this case, did not comply with § 402(b)(3) because they contained no reservation of an amendment power whatsoever. *See Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 949 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990); *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 296 (4th Cir. 1993).

The rules established by trust law and the decisions in *Adams* and *Biggers*, which conflict with the decision of the

Court of Appeals in this case, make sense. A plan provision that places limits on the amendment power must be followed. Where a plan contains no such limits, however, the sponsor's intent to amend should be given effect, especially where any procedural violation of § 402(b)(3) had not caused substantive harm to participants. The sponsor in that case is not receiving "better" treatment than in the former case; different remedies are merely being tailored to different situations. By ignoring these differences and invalidating the Curtiss-Wright amendment, the Court of Appeals erred, and its decision should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals to the extent it holds Curtiss-Wright liable for plaintiffs' benefits.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,
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FRANK C. SCHOONEJONGEN, *et al.*,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does section 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3), require an employee benefit plan to identify specific individuals within the sponsoring organization who have authority to amend the plan, or otherwise require an amendment procedure more detailed than that contained in a plan that expressly reserves the sponsor's right to amend?

2. Does procedural noncompliance with ERISA causing no harm to plan participants -- here the Court of Appeals held that a plan's amendment provisions were insufficiently specific under ERISA section 402(b)(3) -- give rise to a substantive remedy -- here, striking an amendment from the plan document to invalidate a termination of non-vested welfare benefits?

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STATEMENT OF INTEREST[1]

The ERISA Industry Committee ("ERIC") is a non-profit association committed to the advancement of employee retirement, health, and welfare benefit plans of America's largest employers. ERIC's 125 members provide comprehensive retirement, health care coverage and other

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[1] This brief is filed with the consent of the parties. Their letters of consent were filed with the Clerk of the Court with this brief.

comprehensive retirement, health care coverage and other economic security benefits directly to some 26 million active and retired workers and their families. The association has a strong interest in matters affecting its members' ability to deliver those benefits, their cost and their effectiveness, as well as the role of those benefits in the American economy. The Association of Private Pension and Welfare Plans is a broad-based trade association that focuses on the preservation and growth of the voluntary, private sector employee benefits system. Approximately 100 million participants and beneficiaries are covered by plans maintained or serviced by its 240 members, which include many Fortune 500 companies as well as leading employee benefits service organizations. Both associations routinely file briefs as amicus curiae in important employee benefits litigation. Allied-Signal, Inc.; Del Monte Corporation; Heublein, Inc.; INVESCO, Inc.; PepsiCo, Inc.; and RJR Nabisco, Inc. are large corporations. Each sponsors employee benefit plans in which almost all of their employees are participants.

The Third Circuit's decision upsets the common understanding of statutorily mandated plan language and threatens sponsors of employee benefit plans with vexatious litigation and massive liability. Plan amendments that met all legal requirements at the time they were made will be challenged if the ruling below is upheld. Members of the amici associations, as well as the corporate amici, will be adversely affected if the decision is affirmed.

BACKGROUND

A. Introduction.

The Employee Retirement Income Security Act of 1974, as amended, ("ERISA") is a "comprehensive and reticulated statute," *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980), and embodies a complicated set of legislative choices between competing values. *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2071 (1993). Although tensions inevitably result from these choices, courts should not "attempt to adjust the [congressionally set] balance between those competing goals," *id.* at 2072, even for the most sympathetic of reasons. *See McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 482 (1992).

Private sector employee benefit plans exist and are regulated in a voluntary setting, involving a delicate balance under which marketplace forces determine the establishment and continued maintenance of pension and welfare plans within a regulatory system imposed by ERISA and, for tax-qualified plans, the Internal Revenue Code ("Code"). When economic circumstances permit expansions of plan coverage and improvements in benefits, employers respond favorably because, due to competitive pressures, it is in their interest to do so. Adverse economic circumstances lead to contractions of coverage and curtailment of benefits, even termination of plans. In 1974, Congress could have mandated coverage and it could have mandated certain types or levels of benefits. It did neither, opting instead to foster plan formation and maintenance by continuing the

voluntary system, encouraging flexibility in plan design and operation, and making a series of fine value judgments respecting conditions and safeguards to be applied to these voluntarily maintained plans.

In pension plans, these judgments are reflected in, *inter alia*, favorable tax treatment, minimum standards for participation, vesting and accrual, funding rules, and a limited guaranty program for plans that terminate with insufficient assets. Fiduciary responsibility rules, reporting to the government agencies and disclosure to plan participants and beneficiaries round out the regulatory regime. These latter rules apply to welfare plans, but in recognition of the difficulty of predicting costs in such plans, especially health care plans, Congress did not impose minimum vesting and similar rules, because their imposition would tilt the delicate balance too much against the voluntary maintenance of such plans. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir.), *cert. denied*, 114 S. Ct. 196 (1993) (quoting *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988)).

The opinion below has dimensions that transcend the *Curtiss-Wright* facts. It opens to attack on procedural grounds in costly litigation the validity of many amendments that adversely modify benefits provided by private sector employee benefit plans. In health care plans, for example, increased deductibles and co-payments, even those imposed years ago, may be rendered invalid *ab initio* if a plan did not state an amendment procedure that was sufficiently elaborated to meet the Third Circuit's standard. Even legally required benefit reductions under pension plans

may be invalid under the decision, casting a shadow on such plans' continued tax qualification.[2]

Although the Third Circuit purported to narrow its ruling to modifications that are "advantageous to the sponsor's interest," Pet. App. at 11a n.5, this disclaimer offers cold comfort. Amendments that are advantageous to participants are virtually never challenged.[3] Further, amendments frequently consist of a group of modifications, some adverse to participants and some that improve benefits.[4] Litigation about how to characterize a modification will assume a life of its own. The decision, in short, is a wildcard that portends widespread uncertainty and unanticipated cost for plan sponsors and instability for plans and plan participants. It is in no one's best interest.[5]

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[2] *E.g.*, most qualified pension plans had to be amended in order to satisfy congressionally mandated reduced limits on compensation that may be taken into account in calculating benefits. *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No 103-66 § 13212(a)(1), 1993 U.S.C.C.A.N. (107 Stat.) 312, 471 (amending I.R.C. § 401(a)(17)).

[3] See note 8 below for an illuminating exception.

[4] Additionally, even a single modification may affect different classes of participants in different ways, advantageous to some and disadvantageous to others.

[5] The plan sponsor action that gave rise to this case, a modification of retiree health benefits adverse to the retirees' interest, is not unusual. Adverse modifications to welfare plan benefits have been occurring regularly for a number of years. General Accounting Office, *Employee Benefits: Extent of Companies' Retiree Health Coverage* 8-9 (March 1990). These modifications, in turn, result largely from adverse economic circumstances, chiefly marketplace dislocations arising from, *inter alia*, global competition, and health care

B. Summary Statement Of Facts And Proceedings Below.

In 1966, Curtiss-Wright ("CW") began to provide health benefits to retirees formerly employed at its Wood-Ridge facility. Ten years later, CW amended its employee welfare benefit plans, including the plan under which health benefits were provided to retirees ("Plan"), to conform to ERISA. An umbrella "Constitution" was adopted, applying to all CW plans. At all times relevant to this action, the Constitution contained a reservation of CW's right to amend the Plan.[6] Numerous documents, including summary plan descriptions ("SPDs") provided to participants from 1973 on, also contained reservations of rights. *See* Pet. App. at 4a-5a. A new SPD issued in 1983 contained the following language:

> Coverage under this Plan will cease for retirees and their dependents upon termination of business operations of the facility from which they retired.

J.A. at 44.

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cost inflation. Health care costs more than doubled to 12.2 percent of gross national product from 1965 to 1990. Joseph S. Piacentini & Jill D. Foley, *EBRI DATABOOK on Employee Benefits* 188 (2d ed. 1992).

[6] The Constitution provided: "The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." J. Ex. No. 64, Art. 6.1, J.A. at 36.

> Although the Company expects this Plan to continue in its present form for an indeterminable period, this Plan is not a vested Plan and as such is subject to modification or termination by the Company at any time.

Id. at 49. Later in 1983, CW's Wood-Ridge plant was closed and benefits of retirees who had been employed there ceased in accordance with this language.

A class consisting of these retirees brought this action in 1984. On the eve of trial, plaintiffs' sole remaining claim was that their pre-1983 benefits had vested contractually. Pet. App. at 102a-103a. The court found that CW's intent as expressed in the Plan and SPD was ambiguous, and allowed plaintiffs to present evidence extrinsic to those documents. *Id.* at 104a. At trial, the court characterized the 1983 coverage cessation change in Plan language as an amendment. Finding that CW's reservation of the right to amend was not itself an amendment procedure that complied with ERISA section 402(b)(3), it invalidated the amendment. *Id.* at 37a. However, the court held that because of the 1976 reservation of rights, plaintiffs' benefits were not vested, and could be modified or even terminated if a statutorily sufficient amendment procedure were first adopted. *Id.* at 39a-40a.

The Third Circuit affirmed.[7] Comparing CW's reservation of rights to the statute, which requires benefit plans to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan," ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), the court concluded without analysis that a reservation of a right to amend is not the same as a procedure to amend. Pet. App. at 7a.[8]

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[7] The Third Circuit issued two opinions. The first, vacated opinion incorrectly stated that CW could not have terminated the Plan unless it complied with 29 U.S.C. § 1341(b), Pet. App. at 24a, which applies only to pension plans. ERISA § 4021(a)(1), 29 U.S.C. § 1321(a)(1). The second opinion rejected CW's termination argument on the factual ground that there was no evidence that anyone at CW considered the discontinuation of benefits to Wood-Ridge retirees to be a termination of the plan. Pet. App. at 12a.

[8] In an earlier Third Circuit case, *Huber v. Casablanca Indus., Inc.*, 916 F.2d 85 (3d Cir. 1990), *cert. dismissed*, 113 S. Ct. 1070 (1993), an almost identical reservation of rights was found to be a statutorily sufficient amendment procedure. *See* note 11, below. There, however, the plan sponsor was the board of trustees of a multiemployer pension plan seeking to recover withdrawal liability from a former contributing employer that, among other defenses and counterclaims, challenged a plan amendment. *See* ERISA §§ 3(37) and 4201-4402, 29 U.S.C. §§ 1002(37) and 1381-1461. The amendment, increasing benefits under the plan and changing the withdrawal liability allocation formula, had the effect of increasing the employer's withdrawal liability, *id.* at 105-06, thereby benefiting the plan's participants. The distinction drawn by the court below between the reservation of rights in *Huber* and CW's reservation of rights is analytically suspect, but is readily explicable in terms of the result achieved in each case, *i.e.*, the *Huber* reservation sufficed as a statutorily sufficient procedure where it advantaged the participants, but CW's reservation did not suffice where it disadvantaged the participants.

The court held that the absence of an amendment procedure invalidated the 1983 amendment. *Id.* at 11a. It reasoned that invalidation *ab initio* was necessary, alluding to cases holding that challenged amendments should be stricken when a plan has, but does not follow, an amendment procedure. *Id.* at 10a-11a. Finally, the court affirmed the district court's holding that the reservation of rights was valid, *id.* at 14a, noting that the Plan could be amended to terminate the Wood-Ridge retirees' benefits, but only if CW's Board first adopted an amendment procedure. *Id.* at 11a.

C. Legal Setting.

Employee benefit plans under ERISA are either pension plans, which provide retirement income, or welfare plans, which provide health care benefits, severance pay, and a host of other non-pension benefits. ERISA §§ 3(1)-3(3), 29 U.S.C. §§ 1002(1)-1002(3). Pension plans are regulated more extensively than welfare plans. Only pension plans are subject to ERISA's vesting and accrual standards. ERISA §§ 201(1), 203 and 204, 29 U.S.C. §§ 1051(1), 1053 and 1054. Unlike welfare plans, pension plans also are subject to rules that limit a sponsor's ability to terminate if the plan is insufficiently funded. ERISA §§ 4001-4071, 29 U.S.C. §§ 1301-1371. These differences are "not accidental," and they allow welfare plan sponsors "to amend or terminate coverage at any time." *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir.), *cert. denied*, 114 S. Ct. 196 (1993). Pension plans also can be amended and, if tax-qualified, frequently must be amended

to comply with changes in the Code and regulatory guidance issued by the Internal Revenue Service ("IRS").

Indeed, the amendment procedure included in model qualified plans provided by the IRS is similar to CW's reservation of rights and merely states that the sponsor may amend any part of the plan. *See* IRS Regional Prototype, 21 Pens. Rep. (BNA) Special Supp. No. 23, S-59 (June 6, 1994); IRS Defined Contribution Listing of Required Modifications, 21 Pens. Rep. (BNA) Special Supp. No. 14, S-43 (April 4, 1994); Revised IRS List of Required Modifications, 20 Pens. Rep. (BNA) Special Supp. No. 13, S-128 (March 29, 1993). Qualified plans that follow this model language face possible disqualification, with its accompanying hardship to participants and sponsors alike, if the decision below is affirmed.[9]

Because section 402(b)(3) applies to all plans, whether pension or welfare, the decision below applies with equal vigor to all ERISA plans. It raises the specter of massive disruption to tax-qualified plans if amendments made to ensure a plan's continued qualification now are invalidated because the plan's amendment procedure is inadequate under the Third Circuit's reasoning. However, amici focus here on the non-statutory vesting concept that courts have adopted respecting welfare plans because the subject of this action is a welfare plan and because an

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[9] In a tax-qualified plan, employers may deduct contributions, contributions are not taxable as current income to participants, and the plan's earnings are not currently taxed. This preferential treatment is not available if a plan loses its qualified status. Boris I. Bittker & Martin J. McMahon, Jr., *Federal Taxation of Individuals*, ¶ 37.1 (1988).

understanding of how benefits may vest in a welfare plan illuminates the flaws in the reasoning of the decision below.

The non-vested, amendable, and terminable nature of welfare benefits reflects congressional concern over plan sponsors' inability to control the cost of these benefits. "Automatic vesting was rejected because the costs of [health] plans are subject to fluctuating and unpredictable variables." *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988). Because welfare plan benefits do not statutorily vest, retirees whose benefits are modified adversely, such as the Wood-Ridge retirees, must prove that their benefits vested, if at all, by contract. *Id.* at 491.

In cases not involving collectively bargained benefits, courts have looked first to the plan to determine whether retirees had a contractual right to vested post-retirement benefits. *See, e.g., Wise*, 986 F.2d at 929; *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990); *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Moore*, 856 F.2d at 488. Where a plan sponsor has unambiguously reserved the right to amend in the plan and SPDs ("plan documents") before the challenged modification occurs, extrinsic evidence -- *e.g.*, letters, memoranda, and parole evidence outside the four corners of the plan documents -- has been ignored. *See Wise*, 986 F.2d at 937-38; *Moore*, 856 F.2d at 492.

Although included in Part 4 of Title I of ERISA ("Fiduciary Responsibility"), ERISA section 402 is

essentially a disclosure requirement. It requires that a plan be written and contain certain information. The plan instrument must list the named fiduciaries who have authority over the plan, ERISA § 402(a), 29 U.S.C. § 1102(a), and must, *inter alia*, provide an amendment procedure. ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3). Significantly, the plan instrument itself need not be furnished to plan participants automatically, but merely must be made available upon request. ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4).

SUMMARY OF ARGUMENT

CW's reservation of rights was an amendment procedure that satisfied the requirements of ERISA section 402(b)(3). Comparing paragraph (3) to the rest of subsection (b) and to other, far more detailed disclosure rules[10] demonstrates Congress's intent that paragraph (3) not be interpreted to require more than a simple statement that a plan may be amended by the plan sponsor.

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[10] Very detailed disclosure to a plan's participants and beneficiaries is required regarding plan substance and their rights under the plan and ERISA, *e.g.* what benefits their plan provides, the plan's annual financial status, their accrued benefits, their right to continued health coverage at group rates if their employment ceases. ERISA §§ 101(a)(1), 104(b)(3), 105(a) and 606, 29 U.S.C. §§ 1021(a)(1), 1024(b)(3), 1025(a) and 1166. Participants may bring an action against an administrator who fails to provide this information upon request and can recover up to $100 for each day of the violation. ERISA § 502(c)(1), 29 U.S.C. § 1132(c)(1).

Congress's intent respecting the minimal degree of detail for an amendment procedure is further reflected by its omission of a "procedure" requirement for plan termination. If a plan may be terminated, ending both coverage and benefits, without following a procedure, no statutory purpose is served by requiring an amendment procedure that is any more detailed than a reservation of rights.

A more detailed amendment procedure would not have told the retirees anything more useful to them than what they knew from the reservation of rights. Because ERISA does not require a particular type of amendment procedure, a corporate plan sponsor may amend in any way that it normally can act, including through action of an authorized employee. A "company" is a person within the meaning of ERISA, and identification of "the Company" as the person who can amend the plan satisfies section 402(b)(3).

Even if the CW reservation did not satisfy section 402(b)(3), the violation was a procedural one and did not prejudice or harm the plaintiffs. Nor did CW act in bad faith or mislead the retirees. The appropriate remedy for such a violation is, at most, an injunction directing CW to adopt a statutorily sufficient amendment procedure. The remedy imposed by the court below -- invalidation of the amendment *ab initio* -- was drastically disproportionate to the severity or effects of the violation, and unwarranted. In leaping from the violation to the remedy of *ab initio* invalidation, the Third Circuit ignored both sound principles of trust law and its own precedent.

The decision below should be reversed, except insofar as it recognized the validity of the reservation of rights to amend or terminate the Plan.

ARGUMENT

A. CW's Reservation Of Rights Provided A Statutorily Sufficient Procedure.

CW's reservation of rights both provides an amendment "procedure" and identifies the "person" authorized to amend. The plan instrument -- the Constitution -- states that the Plan may be changed by "the Company." The language of the statute requires no more and, before this case, no court had required more. A comparison with the amendment procedure endorsed by the Third Circuit panel in *Huber* is useful. That procedure is also a reservation of rights, nearly identical to CW's and no more elaborated than CW's.[11] Although plans are, and often must be, written in technical language, both reservation clauses are clear and to the point. As explained above, note 8 and accompanying text, the *Huber* court held that the reservation there provided a statutorily sufficient procedure. *Huber* at 106.

There is a strong inference in section 402(b)(3) that its drafter contemplated an amendment procedure no more elaborate than the CW or *Huber* reservations. By contrast,

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[11] "At any time and from time to time the Trustees may amend or modify this plan in whole or in part," *Huber*, 916 F.2d at 105 n.43.

each of the other paragraphs of section 402(b) demands more detail. The most exacting is paragraph (4), which requires the plan to "*specify the basis* on which payments are made to and from the plan" (emphasis added). Paragraph (2) requires the plan to "*describe* any procedure . . . for the allocation of responsibilities for the operation and administration of the plan" (emphasis added). Even paragraph (1), which also begins with the phrase "provide a procedure," ultimately demands more: the procedure for establishing and carrying out a funding policy and method must be "consistent with the objectives of the plan and the requirements of this title." ERISA § 402(b), 29 U.S.C. § 1102(b). The degree of elaboration called for by each of the other paragraphs of section 402(b) demonstrates that Congress knew how to require something more than a simple statement when it wished to do so.

The inference that the disclosure required by section 402(b)(3) of ERISA is satisfied by a declaration that the plan can be amended by the sponsor is strengthened upon review of other ERISA disclosure provisions. The statute contains a multitude of requirements intended to advise participants and beneficiaries about the substance of their plans and their rights thereunder. These provisions are very detailed and specific. *See* note 10, above. Section 402(b)(3), by contrast, deals with procedure. Its purpose is not to explain what the plan provides to participants and beneficiaries but rather, the manner in which it can be changed and by whom. CW's reservation satisfied this purpose.

The interpretation of section 402(b)(3) in the decision below is particularly problematic in light of ERISA's treatment of a welfare plan termination. ERISA requires no procedure to terminate welfare plans.[12] CW clearly reserved the right to terminate, J.A. at 36 and 49, and the Third Circuit upheld the validity of that reservation.

If a plan sponsor may terminate an entire plan, ending all benefits for all participants, without following any statutorily-mandated "procedure," no statutory purpose is served by importing elaborate procedural content into section 402(b)(3) through judicial fiat. Such an interpretation would make it easier to terminate a plan than to amend it.[13]

A more detailed procedure, identifying CW's Board of Directors as suggested in the decision below, would not have provided the retirees with information any more useful to them than what they were advised by the reservation of rights. It most certainly would not have enabled them "to determine with certainty at any given time what the plan

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[12] The only ERISA provisions bearing on welfare plan terminations are §§ 403(c)(1) and 403(d)(2), 29 U.S.C. §§ 1103(c)(1) and 1103(d)(2). However, they do not restrict the right to terminate, but rather address the disposition of plan assets upon termination.

[13] Nothing in ERISA prohibits the termination of a welfare plan followed immediately by the establishment of a new plan with different benefits or covering a different group of participants. However, termination and reestablishment is cumbersome and needlessly expensive as a substitute for an amendment.

provides."[14] Pet. App. at 8a. Consistent with its Congressional goal of fostering voluntary plan establishment and maintenance by employers, ERISA does not require a role for participants in plan amendments.[15] CW's reservation of rights therefore provided Plan participants with all knowledge they could use about how their Plan could be amended. It alerted them to the possibility that a change could be made at any time, that it could be a total or partial change, and that CW would decide whether, when, and how to change the Plan.

Because section 402(b)(3) does not specify any particular procedure, a company may amend in any way it could normally accomplish corporate objectives, including but not limited to action by the board of directors or action by an authorized employee pursuant to general corporate or agency law principles. *See United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974) ("A corporation can only act through its employees and, consequently, the acts of its employees, within the scope of

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[14] Even an extremely detailed amendment *procedure* would not inform participants of a plan's substantive provisions, nor would it assure participants that any particular "amendment" complied with the procedure.

[15] Amending a plan is a function of the plan sponsor acting as a settlor. *See, e.g., Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160-62 (3d Cir. 1990); *Ryan v. Chromalloy American Corp.* 877 F.2d 598 (7th Cir. 1989); *Musto v. American General Corp.*, 861 F.2d 897, 911-12 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); Letter from D.M. Kass, Asst. Sec'y., Dept. of Labor, to J.N. Erlenborn, 13 Pens. Rep. (BNA) 472 (March 17, 1986).

their employment, constitute the acts of the corporation."); *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992) (deeming traditional agency law principles relevant to understanding a poorly defined term -- "employee" -- where ERISA contained no indication that applying such principles thwarted congressional design).

B. CW's Procedure Identified The "Person" With Authority To Amend The Plan.

CW's identification of "the Company" in its amendment procedure more than satisfied section 402(b)(3). In this regard, CW's procedure was more extensive than required. Read literally, paragraph (3) does not demand identification *in the plan* of persons with authority to amend but only that a "procedure . . . for identifying [them]" be provided. ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3).

"Person" is a term expressly defined in ERISA. Section 3(9) defines a "person" as:

> an individual, partnership, joint venture, *corporation*, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

ERISA § 3(9), 29 U.S.C. § 1002(9) (emphasis added).

The conclusion of the court below that "the Company" does not identify a person ignored section 3(9).[16] It is widely understood and accepted that a company is a "person" for the purposes of ERISA. For example, ERISA section 3(21) defines a fiduciary as a "person" who has or exercises the authority listed in that section. Both courts and the Department of Labor recognize that a corporation is a "person" and can thus be a "named fiduciary" for the purpose of ERISA section 402(a)(1). *Confer v. Custom Eng'g. Co.*, 952 F.2d 34, 36 (3d Cir. 1991); 29 C.F.R. § 2509.75-5, FR-3.[17]

The distinction drawn by the Third Circuit between "the Company," which CW used, and "the Trustees," which that court deemed sufficient in *Huber*,[18] is legally and factually meaningless. Neither word is expressly found in ERISA section 3(9). The words "corporation" and "trust"

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[16] *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) ("There is, however, a more fundamental problem with the Court of Appeals' interpretation of the term 'participant': it strays far from the statutory language.").

[17] The broad definition of "person," including corporations and other entities, also applies in other ERISA contexts. For example, ERISA prohibits certain transactions between plans and a "party in interest." Among such parties is "a person providing services to [a] plan." ERISA §§ 3(14)(B) and 406(a), 29 U.S.C. §§ 1002(14)(B) and 1106(a). Many such "persons" are companies, typically corporations, and have been sued as such for engaging in prohibited transactions. *See, e.g., Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209 (2d Cir. 1987). Liability to the Pension Benefit Guaranty Corporation for unfunded pension plans is also imposed on "persons." ERISA § 4062, 29 U.S.C. § 1362.

[18] *See* notes 8 and 11, above.

are used. Corporate employers and trustees are treated equally elsewhere in the statute. If a written plan does not identify the administrator, ERISA states that the sponsor is the administrator. Sponsor, in turn, is defined as the employer in a single-employer plan, and the board of trustees in a multiemployer plan. ERISA § 3(16), 29 U.S.C. § 1002(16). There is no statutory basis for validating an amendment by "the Trustees" of a multiemployer plan and not validating one by "the Company" in a single-employer plan.[19]

C. *Ab Initio* Invalidation Of The 1983 Amendment Was A Wholly Inappropriate Remedy And Contrary To Established Principles Of Trust Law.

Assuming *arguendo* that the reservation of rights did not satisfy the requirements of section 402(b)(3), invalidation of the amendment *ab initio* was the wrong remedy. Under established principles of trust law, if a settlor has reserved power to amend but has not specified the manner of amendment, the "settlor may exercise the power in any manner that 'sufficiently manifests his intention to modify the trust.'" *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291, 295 (4th Cir. 1993) (quoting *Restatement*

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[19] Additionally, the reasoning of the court below raises the specter of other courts interpreting section 402(b)(3) to require identification of individuals by name in the plan document. Yet each time an identified individual left his or her position and was no longer empowered to amend the plan, the plan document itself would have to be amended to reflect their departure and replacement. This would be confusing and wasteful, and would further no statutory purpose.

(Second) of Trusts, § 331 cmt. e.). Relying on the trust law analogy, the Fourth Circuit held "that in the absence of . . . procedures for amendment, a writing amends a plan . . . when accompanied by a clear manifestation of an intent to alter the . . . plan . . . . A [contrary] rule *would expose companies to unpredictable consequences whenever they undertook a review of existing policies.*" *Id.* at 296 (emphasis added).[20]

Deibler v. United Food and Commercial Workers' Local Union 23, 973 F.2d 206 (3d Cir. 1992), also applied this principle. *Deibler* involved a long-standing severance plan for local union officers that was terminated by resolution adopted by a trustee appointed by the parent national union after the local encountered financial difficulties. The plan had no reservation of rights and no amendment procedure. Plaintiff Deibler was dismissed from his position shortly after the resolution and his demand for severance benefits was denied. The Third Circuit held that the resolution manifested a clear intent to amend the severance pay plan and upheld the denial of benefits. *Id.* at 210.

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[20] The *Biggers* court cited *Adams v. Avondale Indus., Inc.*, 905 F.2d 943 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990), for the proposition that lack of an amendment procedure does not render a plan unamendable. The *Adams* court, in a case involving severance benefits, equated a reservation of rights with an amendment procedure and validated a written amendment reducing benefits where plaintiff plan par icipants failed to show detrimental reliance based on the lack of a procedure. *Id.* at 949.

The Third Circuit in *Curtiss-Wright* ignored this body of law and did not inquire whether intent to amend the plan was manifested, but rather relied on inapposite case law, where a procedure was in the plan but the plan sponsor failed to follow it in making an amendment. Pet. App. at 10a-11a (citing *Albedyll v. Wisconsin Porcelain Co. Rev. Ret. Plan*, 947 F.2d 246 (7th Cir. 1991), and *Frank v. Colt Industries, Inc.*, 910 F.2d 90 (3d Cir. 1990) *reh'g and reh'g en banc denied*).

Juxtaposing *Murphy v. Keystone Steel & Wire Co.*, 850 F. Supp. 1367 (C.D. Ill. 1994), with the decision below provides an instructive contrast. In *Murphy*, Keystone had maintained health benefits for retirees pursuant to a series of collective bargaining agreements. Keystone then unilaterally announced prospective adverse modifications affecting certain retirees. The plan had no amendment procedure. Ruling on cross-motions for summary judgment, the district court followed the trust law analogy, inquiring whether Keystone had manifested a clear intent to amend. Finding that it had[21] and that the plaintiff class could not demonstrate detrimental reliance, the court refused to invalidate the amendment and granted Keystone's summary judgment motion.[22] *Id.* at 1378-82.

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[21] *Murphy's* explicit linkage of retiree health benefits to the duration clause of the collective bargaining agreement arguably was less clear than CW's reservation of rights, which unmistakably advised retirees that their plan might be amended.

[22] The court noted that plaintiffs were not foreclosed from forcing Keystone to comply prospectively with section 402(b)(3). *See* ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

CW's reservation of rights, even if not sufficient under section 402(b)(3), manifested intent even more clearly than in *Murphy*. Further, CW's amendment, like the announcement given to the *Murphy* retirees, gave the Wood-Ridge retirees "the same 'warning' that compliance with an amendment procedure satisfying ERISA would have given them." *Id.* at 1382. Also, as in *Murphy*, one cannot "perceive any substantive harm to [the retirees] which exists by reason of [CW's] failure to comply with [402(b)(3)] as distinct from the harm resulting from the amendment itself," *id.*; that is, the CW retirees did not detrimentally rely on the absence of an amendment procedure.

Here, both the Plan and the SPD advised participants, including the plaintiff class, that CW ("the Company") could at any time amend or terminate the plan. The reservation of rights, even if not an amendment procedure within the meaning of section 402(b)(3), put them fully on notice that their benefits were not permanent and immutable. An amendment procedure that, in the eyes of the Third Circuit, passes muster under section 402(b)(3), *i.e.*, one that reserved the right to amend to the "Board of Directors" of the company, would not have given them any material information they did not have by virtue of the actual reservation.[23]

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[23] It strains even credulity to imply, as does the court below, that from the perspective of an employee or retiree of a large company there is any functional distinction between identification of "the Company" and identification of the "Board of Directors" of the company.

As noted above, the requirements of section 402(b) are properly viewed as part of ERISA's disclosure regime. Although lodged in the portion of the statute that regulates the conduct of fiduciaries, they have little to do with fiduciary responsibility, but rather with disclosure obligations relating to plan structure.[24] They speak to provisions that must be part of a plan, and paragraph (3) in particular, addresses a settlor function -- plan amendments. *See* note 15, above.

The weight of recent authority holds that a plan sponsor's failure to satisfy an ERISA disclosure requirement does not warrant damages, absent a showing of bad faith, active concealment, or prejudice to participants. *See Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 588-89 (1st Cir. 1993); *Godwin v. Sun Life Assur. Co.*, 980 F.2d 323, 328 (5th Cir. 1992); *Harsch v. Eisenberg*, 956 F.2d 651, 662 (7th Cir.), *cert. denied*, 113 S. Ct. 61 (1992); *Kreutzer v. A.O. Smith Corp.*, 951 F.2d 739, 744-45 (7th Cir. 1991), *reh'g en banc denied*, 1992 U.S. App. LEXIS 2092 (7th Cir. 1992); *Plotkin v. Bearings, Ltd.*, 777 F. Supp. 1105, 1108 (E.D.N.Y. 1991); *United Paperworkers Int'l Union, Local 14 v. International Paper Co.*, 777 F. Supp. 1010, 1021 (D. Me. 1991).

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[24] *See* H.R. Rep. No. 553, 93d Cong., 1st Sess. 11, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649 (purpose of ERISA disclosure rules: "that the individual participant knows exactly where he stands with respect to the plan -- what benefits he may be entitled to, what circumstances may preclude him from obtaining benefits, what procedures he must follow to obtain benefits, and who are the persons to whom management and investment of his plan funds have been entrusted.").

Additionally, three decisions of this Court recognize that "[r]etroactive liability could be devastating for a [plan]." *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 722 and n.42 (1978); *Florida v. Long*, 487 U.S. 223, 235-36 (1988); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1105-08 (1983). Even where the law is clear to this Court, it has acknowledged that "conscientious and intelligent administrators . . . , who did not have the benefit of the extensive briefs and arguments presented to us, may well have assumed that [the challenged plan] was entirely lawful." *Manhart* at 720. Retroactive application of the decision below will, at a minimum, foster expensive, court-clogging litigation and threatens massive liability for "conscientious and intelligent" plan sponsors. Should the Court find for the retirees, equitable considerations strongly support prospective application only.

Given the Third Circuit's recognition that CW's reservation of rights trumped plaintiffs' claim that they had a vested right to their benefits, this is a "no harm, no foul" case, pure and simple. No retiree was misled, disadvantaged, or otherwise harmed in any way by CW's failure to provide a more elaborated amendment procedure. The "remedy" provided below is punitive and drastically out of proportion to the severity of the violation.

CONCLUSION

For many years before the early '80s, economic conditions allowed plan sponsors to extend health care

benefits to retirees and to improve those benefits successively.[25]

By the late '70s, health care costs had begun to escalate dramatically, coinciding with major economic dislocations caused by foreign competition and other factors. Relying on reservations of rights clauses, many plan sponsors during the past 15 years have responded to these phenomena by, *inter alia*, amending health plans to institute or increase deductibles and co-payments, adopt managed-care mechanisms, eliminate or curtail benefits, or even terminate plans.[26]

If the Third Circuit's holding respecting the remedy is affirmed, all of these adverse modifications may be challenged, leading to a flood of federal court litigation and potential liability for plan sponsors of hundreds of millions of dollars in the aggregate.

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[25] None of those improvements, most of which were accomplished by plan amendment, was ever challenged, of course, nor was it ever suggested that the plan sponsor's reservation of rights was a statutorily insufficient amendment procedure to support such amendments. *See Murphy*, 850 F. Supp. at 1375: "In fact, Plaintiffs' counsel admitted during argument that their legal theory allowed them to accept the benefits of any favorable changes . . . over the years . . . but not unfavorable changes, a position made easier by the fact that he could not recall any unfavorable changes prior to the action by Keystone giving rise to the controversy at issue."

[26] Similarly, pension plans have been amended to modify benefits adversely. As part of its balancing of competing objectives, Congress in ERISA prohibited cutbacks of accrued benefits, *see* ERISA § 204(g), 29 U.S.C. § 1054(g), but pension plans may be amended to provide less generous benefit formulas prospectively.

There is a final point to be made. Absent bad faith, no court heretofore has held that active employees covered by a health care plan that is amended to modify benefits adversely may insist on maintenance of the pre-amendment, higher level of benefits. The reservation of rights in non-bargained plan documents has uniformly been understood to prevent a claim of contractual vesting before retirement, while in collectively bargained plans adverse modifications made pursuant to bargaining are upheld with respect to active employees. However, if an amendment adversely modifying active participants' benefits can be challenged on the grounds that the plan did not provide a statutorily sufficient amendment procedure, active employees will be able to side-step sound doctrine and challenge even modifications made many years ago.

Amici believe they have presented compelling arguments that CW's reservation of rights was a statutorily sufficient procedure and, even if it was not sufficient, that the remedy provided by the court below was improper. CW's reservation of rights is a formulation commonly incorporated in private sector employee benefit plans and, at least before the decision below, was understood by plan sponsors as satisfying ERISA's amendment procedure requirement. Consequently, CW should not incur liability for following what was accepted industry practice, particularly where no retiree was harmed.

However, if this Court should determine both that CW's reservation of rights did not provide a statutorily sufficient amendment procedure and that invalidation *ab initio* of the 1983 amendment is an appropriate remedy in

this case, it should limit the effect of its holding to this case. Plan sponsors then would have to review their reservations of right/amendment procedures and revise them, if necessary in light of this Court's ruling. However, they will not be exposed to retroactive liability merely by virtue of having followed settled practice endorsed by the federal government in its recommended forms for plan documents.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

CURTISS-WRIGHT CORPORATION,

Petitioner,

v.

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file a brief *amicus curiae* in support of petitioner, Curtiss-Wright Corporation. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 220,000 businesses and professional organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the

Executive Branch and independent regulatory agencies of the federal government.

Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. For example, the Chamber has participated *amicus curiae* in the following ERISA cases recently decided in this Court: *District of Columbia v. The Greater Washington Board of Trade*, ___ U.S. ___, 113 S. Ct. 580 (1992), *Patterson v. Shumate*, ___ U.S. ___, 113 S. Ct. 13 (1992), *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990), *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), and *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988). In this case, the Court granted the motion of the Chamber to file a brief *amicus curiae* in support of petitioner at the *certiorari* stage.

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA, both pension and welfare. The misguided decision below, which throws into doubt the terms of most employee benefit plans covered by ERISA, profoundly and adversely affects the Chamber's members, potentially subjecting them to retroactive liability in proportions difficult to imagine and the prospect of unnecessary, time-consuming and expensive litigation over the operation of their plans for the past 19 years.

Petitioner has consented to the Chamber's filing of a brief *amicus curiae* in this matter, and a copy of the consent letter is being filed simultaneously herewith. Respondent has not consented.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Does ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), require an employee benefit plan to identify specific individuals within the sponsoring organization who have authority to amend the plan, or otherwise require an amendment procedure more detailed than that contained in a plan that expressly reserves the sponsor's right to amend the plan?

2. Does a procedural noncompliance with ERISA causing no harm to plan participants – here, the Court of Appeals held that a plan's amendment provisions were insufficiently specific under ERISA § 402(b)(3) – give rise to a substantive remedy – here, striking an amendment from the plan document to invalidate a termination of nonvested welfare benefits?

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INTEREST OF THE *AMICUS CURIAE*

The interest of the Chamber as *amicus curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Curtiss-Wright plan, by expressly reserving to Curtiss-Wright the authority to amend the plan, satisfies the minimum requirements of ERISA section 402(b)(3) for two reasons. First, ERISA requires a "procedure" for amendment. The "procedure" in the Curtiss-Wright plan is action by Curtiss-Wright. While ERISA accommodates other plans that may have need of more elaborate procedures, including weighted voting or the concurrence of third parties, the Curtiss-Wright plan needs no more "procedure" than action by Curtiss-Wright, which has always been considered sufficient under the common law of trusts, on which the ERISA provision is modeled.

Second, ERISA requires identification of the "person" with authority to amend. But "person" is a defined term in ERISA that explicitly includes corporations (as well as other business entities). By identifying the corporation with authority to amend, the Curtiss-Wright plan satisfies the ERISA requirement to identify the "person" with authority to amend. Reading ERISA to require identification of the individuals and the means by which the corporation acts is inconsistent, not only with the language of section 402(b)(3), but also with the structure of ERISA.

Even if the amendment provision of the Curtiss-Wright plan did not satisfy ERISA section 402(b)(3) as to form, it clearly satisfies ERISA as to substance by expressly reserving the right to amend and putting all who read the plan on notice of that right. Striking the amendment at issue in this case would elevate form over substance and finds no basis in the language, structure or policy of ERISA. On the contrary, it is apparent from the language, structure and policy of ERISA that section 402(b)(3) was intended as a tool for the fiduciary who

administers the plan to know what the terms of the plan are. Accordingly, the validity of amendments should be left to the fiduciary in the first instance, who can apply well-accepted principles from the common law of trusts to judge the validity of amendments. If the amendment provision in the plan leaves the fiduciary unable to judge the validity of an amendment, the fiduciary can always sue the employer under ERISA to compel the employer to upgrade the amendment provision in the plan.

The practical consequences of the decision below weigh heavily in favor of reversal. For one thing, the decision below affects literally millions of employee benefit plans – both pension and welfare – because the language of the Curtiss-Wright plan is the conventional language almost universally employed by drafters of employee benefit plans since ERISA. For another, virtually all such plans have undergone repeated amendment since ERISA for important reasons such as to comply with changes in law and regulations, to share the burden of costs between employers and employees, and to deal with corporate reorganizations such as acquisitions and divestitures.

Besides the breadth of the consequences, the seriousness of the consequences is startling. If prior amendments that were needed to comply with changes in law and regulations are suddenly void, pension and profit sharing plans intended to be qualified under section 401(a) of the Internal Revenue Code could be retroactively disqualified, with horrendous consequences to employers and employees alike. Welfare plans could be required to reimburse employees for millions of dollars of deductibles and co-pays that were instituted by plan amendment. Benefits that employers thought had been eliminated will spring back to life, creating enormous retroactive liability, and benefit increases that were granted by amendment will be retroactively declared void but will, in practical terms, be unrecoverable.

Perhaps worst of all, since plan administrators are fiduciaries bound to carry out the terms of the plan only insofar as those terms are consistent with ERISA, millions of plan administrators will be required to reconstruct what the terms of their plans are (and have been since ERISA took effect in 1975), ignoring all amendments adopted under the language held insufficient by the decision below. At risk of personal liability for any mistakes, prudence will dictate that the plan administrators flock to the federal courts for instructions, generating countless actions by plan administrator against defendant classes of past and present participants in the plan to settle the terms of the plan and the rights of the participants. Needless to say, putting the federal courts between the administrators and the participants to reconstruct everyone's rights for the past 19 years is a burden never intended by Congress in ERISA and would seriously impair the real intent of Congress in ERISA to foster and promote employee benefit plans.

ARGUMENT

I. BY ACTUALLY NAMING A CORPORATION AS THE PERSON WITH AUTHORITY TO AMEND THE PLAN, THE CURTISS-WRIGHT PLAN EXCEEDS THE MINIMUM REQUIREMENTS OF ERISA SECTION 402(b)(3).

The Curtiss-Wright plan expressly reserves the right to amend the plan and specifically names Curtiss-Wright as the person holding that right:

> The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan.

(4a.)

That is the conventional language used routinely by drafters of employee benefit plans. For example, recent years have seen an explosion of cases – like this one – where retirees have challenged the reduction or elimination of health insurance benefits. In almost every case

where the plan provision regarding amendment is reported, it is in substance identical to the language in the Curtiss-Wright plan.[1]

The conventional language originated long before ERISA. From the beginning of employee benefit plans, good drafters have expressly reserved to the employer the right to amend the plan at any time. This has always been considered necessary under the common law of trusts, which holds that a trust generally cannot be amended unless such authority is expressly reserved in the trust instrument. IV W. Fratcher, *Scott on Trusts* (1980) § 331 at 378-379; G. Bogert, *The Law of Trusts and Trustees* (2d ed. 1983) Ch. 47, § 992 at 218-219; *Restatement (Second)*

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[1] *See, e.g., Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133 (6th Cir. 1993); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 196 (1993); *Boyer v. Douglas Components Corp.*, 986 F.2d 999 (6th Cir. 1993); *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698 (11th Cir. 1993); *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992); *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2992 (1993); *United Paperworkers Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384 (8th Cir. 1992); *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989); *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *In re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986); *Sprague v. General Motors Corp.*, 843 F. Supp. 266 (E.D. Mich. 1994); *In re Unisys Corp. Retiree Benefits Litigation*, 837 F. Supp. 670 (E.D. Pa. 1993); *United Steelworkers v. Newman-Crosby Steel, Inc.*, 822 F. Supp. 862 (D.R.I. 1993); *Benedict v. United Inter-Mountain Telephone Co.*, 820 F. Supp. 354 (E.D. Tenn. 1993); *Joyce v. Curtiss-Wright Corp.*, 810 F. Supp. 67 (W.D.N.Y. 1992); *Chervin v. Sulzer Bingham Pumps, Inc.*, 13 EBC 1089 (D. Or. 1990); *Box v. Coalite, Inc.*, 643 F. Supp. 709 (N.D. Ala. 1986).

of Trusts § 331.[2] Under the common law of trusts, the conventional language was sufficient. *See, e.g., Finnell v. Cramet, Inc.*, 289 F.2d 409 (6th Cir. 1961) (Illinois law).

In 1974, ERISA created a "comprehensive and reticulated" scheme of minimum standards for employee benefit plans. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). Among those standards were fiduciary standards, which in large part were borrowed from, and intended to carry forward, the common law of trusts. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, ___ U.S. ___, 113 S. Ct. 2264 (1993) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-332 (1981)); *Mertens v. Hewitt Associates*, ___ U.S. ___, 113 S. Ct. 2063 (1993); *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985); *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

Carrying forward the common law of trusts, ERISA established a statutory requirement that every plan, at a minimum, provide an amendment procedure:

> Every employee benefit plan shall –
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> . . .
>
> (3) provide a procedure for amending the plan, and for identifying the persons who have authority to amend the plan.

ERISA sec. 402(b), 29 U.S.C. § 1102(b). In short, section 402(b)(3) requires each plan to set out how amendments are made, including who makes them.

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[2] This flows from the unilateral nature of a trust and stands in contrast to the law of contracts, under which the parties can amend by mutual consent and need not reserve such authority in the original contract. 1A A. Corbin, *Corbin on Contracts* (1963) § 186; *Restatement (Second) of Contracts* (1979) § 89(a); Uniform Commercial Code § 2-209(1).

An earlier version of what became section 402(b)(3) would have rigidly authorized the plan administrator to make amendments.[3] That proposal would have failed to take into account the variety, among different types of employee benefit plans, as to who can amend and how.

As for *who*, it is not unusual for an employer to retain a third-party to administer an employee benefit plan, but the employer would not want the third-party plan administrator to have the right to amend the plan. In some cases, the authority to amend is shared, such as between the employer and a union representing the employees covered by the plan. And in still other cases, the authority to amend is split. For example, many employers adopt prototype plans sponsored by banks and insurance companies, under which the bank or insurance company retains authority to amend the "boilerplate" provisions of the prototype plan and the employer retains the authority to amend those provisions peculiar to it. There simply was no single formulation of *who* that would accommodate the variety that already existed, so section 402(b)(3) wisely requires, as a minimum standard, only that the plan provide a procedure for identifying who can amend.

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[3] H.R. 2, as passed by the House of Representatives on March 6, 1974, provided:

> The administrator . . . shall be deemed to have full authority and responsibility for the operation of such employee benefit plan including the authority to . . . amend such plan (except with respect to contribution rates) where such an amendment is necessary to meet the requirements of this title or where such an amendment is necessary to protect the interests of the participants.

H.R. 2, 93d Cong., 2d Sess. (1974), sec. 111(a)(1), *reprinted in* 3 *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976) at 3948.

As for *how*, there is also considerable variety. Before ERISA, when a pension or profit sharing plan commonly coexisted in the same document as the trust agreement and was administered by the trustee, it was common procedure that amendments would be made by the employer but would not take effect unless and until furnished to the trustee, who could veto amendments that materially increased the trustee's duties or liability. Occasionally, single-employer plans condition the validity of amendments on other procedural steps, such as approval by the Internal Revenue Service or notification to employees. And in the case of insured welfare plans, the procedure for amendment may include securing the written consent of the insurance company.

As for *how*, even greater variety exists in multiemployer plans – pension or welfare plans maintained by unrelated employers (sometimes thousands of unrelated employers) pursuant to collective bargaining agreements with one or more unions. In the multiemployer field, elaborate amendment procedures are not unusual, including weighting the votes of employers according to how many employees of that employer are covered by the plan or giving certain major employers (by name) one vote each and all other employers collectively one vote. Other procedures may provide for amendment by the trustees of the plan, followed by written notification to the employers, who can block the amendments by a two-thirds vote. The final formulation of ERISA section 402(b)(3) accommodates the variety of amendment procedures not by requiring any particular procedure but requiring, as a minimum standard, only that the plan have a procedure.

Still, in the vast majority of plans, there is no need of such elaborate "procedures." In the typical single-employer plan, the employer simply reserves to itself the

right to amend the plan – no weighted voting, no notice to other parties, and no concurrence by a trustee, union, insurer or governmental agency. In that case, the "procedure" is condensed down to action by the employer, without more. And the "procedure" automatically includes identification of the person with authority to amend: the employer. Thus, express reservation to the employer of the authority to amend satisfies the minimum requirements of ERISA section 402(b)(3).

It is important to note that "person" is a defined term in ERISA and includes not only individuals but also corporations and other business entities.[4] In the case of a corporation, therefore, if the definition were substituted for the defined term, ERISA section 402(b)(3) would read:

> Every employee benefit plan shall –
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> . . .
>
> (3) provide a procedure for amending the plan, and for identifying the *corporations* who have authority to amend the plan.

Like most single-employer plans, the Curtiss-Wright plan clearly sets out how amendments are made and who makes them: by action of Curtiss-Wright. By actually identifying the corporation in the plan, rather than just providing a procedure for identifying the corporation, the Curtiss-Wright plan more than satisfies the ERISA section 402(b)(3); indeed, it exceeds the minimum requirement of that section.

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[4] ERISA section 3(9), 29 U.S.C. § 1002(9), provides:

> The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association or employee organization.

When Congress wished to specify living human beings in ERISA, it used the word "individual." ERISA section 4001(a)(14)(C)(ii)(V), 29 U.S.C. § 1301(a)(14)(C)(ii)(V), defines "individual" as "a living human being."

The decision below misunderstands section 402(b)(3) in two respects. First, the decision below misunderstands "person" as requiring the plan to identify the individual or individuals who act for the corporation. It does not: by definition the corporation *is* the "person" who must be identified under section 402(b)(3). Second, the decision below assumes that the "procedure" referred to in section 402(b)(3) is the procedure by which the corporation governs itself – majority vote of a quorum of the board of directors at a meeting or unanimous written consent, for example. That is incorrect: the "procedure" is the procedure *for amending the plan*, in this case simply action by the employer, without more.

The distinction between a procedure for amending the plan and the procedure by which the actor acts is easy to see where the amendment procedure is elaborate, such as action by the employer, followed by timely notice to the bank trustee, followed by expiration of a period during which the bank trustee may reject the amendment. No one would complain that such a plan lacks a "procedure" because it does not specify how either the employer or the bank trustee arrives at its decision. On the other hand, where the procedure is nothing more than action by a corporation (as in this case), a court may be seduced by the simplicity of the procedure into probing deeper – into corporate governance – to find a "procedure." That is a mistake because the statute explicitly requires, not a procedure by which the corporation governs itself, but "a procedure *for amending the plan* . . . " ERISA sec. 402(b)(3) (emphasis added).[5]

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[5] This also explains what appears at first glance to be somewhat odd phraseology in section 402(b)(3). One might have expected section 403(b)(3) to provide for identification of the actor first, followed by the procedure for how the actor adopts

Misunderstanding "procedure" in section 402(b)(3) as the procedure by which the corporation governs itself would also be inconsistent with the structure of ERISA. In ERISA, Congress repeatedly imposed obligations on "the employer," yet Congress never felt the need to specify how the employer is to act.[6] ERISA never descends to the level of specifying action by officers, or the board of

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the amendment. If so, that formulation might have lent some support to the reading reflected in the decision below. Instead, the order of those elements is reversed: first the procedure for amending the plan and then, *as a part of that procedure,* identification of the person with authority to amend. Though odd at first glance, this formulation makes clear that identification of the actor is merely an element of the "procedure for amending the plan," which rules out the notion that "procedure" refers to the rules by which the actor acts.

[6] *See, e.g.*, ERISA sections 101(d), (e) and (f), 29 U.S.C. §§ 1021(d), (e), and (f) (notification of funding deficiency, providing information to the Medicare/Medicaid Data Bank); ERISA section 209, 29 U.S.C. § 1059 (maintenance of records); ERISA section 302(c)(11), 29 U.S.C. § 1082(c)(11) (liability for contributions to plan); ERISA section 515, 29 U.S.C. § 1145 (obligation to contribute to multiemployer plan); ERISA section 606, 29 U.S.C. § 1166 (notification under COBRA); ERISA sections 4001(a)(13), 4007(e), 29 U.S.C. §§ 1301(a)(13), 1307(e) (payment of premiums to the Pension Benefit Guaranty Corporation, through the definition of "contributing sponsor"); ERISA section 4041(c)(2)(B), 29 U.S.C. § 1341(c)(2)(B) (distress termination of pension plan); ERISA section 4042(d)(1)(vii), 29 U.S.C. § 1342(d)(1)(vii) (furnishing information to trustee of terminated plan); ERISA section 4043(a), 29 U.S.C. § 1343(a) (notification to plan administrator of reportable events); ERISA section 4062(a), 29 U.S.C. § 1362(a) (liability to the Pension Benefit Guaranty Corporation after termination of plan); ERISA section 4063(b), 29 U.S.C. § 1363(b) (liability upon withdrawal from multiple employer plan); and ERISA sections 4202 *et seq.*, 29 U.S.C. §§ 1382 *et seq.* (withdrawal liability to multiemployer plan).

directors, or any other individual who might act on behalf of the corporation. If Congress itself was content to impose its procedures and requirements on "the employer" throughout ERISA, without specification of how the employer acts, it is unreasonable to suppose that Congress would have been unsatisfied with a plan's designation of "the employer" as the person with authority to amend the plan, without specification of how the employer acts.

The decision below scoffs at the idea that a formulation such as "action by the employer" could be a sufficient procedure, without specifying how the employer acts. (7a-8a.) That reaction overlooks decades of development of the common law of trusts, under which it is entirely sufficient for the settlor to reserve the right to amend without specifying how the settlor will exercise that right. It also overlooks the well-developed competency of fiduciaries and the courts to resolve questions about the validity of employer action when presented. "The terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.' " *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989).

For example, at common law, if the settlor reserves a right to modify the trust but does not specify how he shall exercise that right, the right may be exercised by any method which sufficiently manifests his intention to modify the trust. *Restatement (Second) of Trusts*, sec. 331, comment c. Any definitive manifestation by the settlor of his intention is sufficient, including, for example, execution and delivery to the fiduciary of a new instrument declaring terms different from the original instrument (as Curtiss-Wright did by issuing a new summary plan

description [5a, 36a, 38a-39a]) or communicating his intention to the beneficiaries (as Curtiss-Wright did by publishing the new summary plan description to participants [5a]). *Restatement (Second) of Trusts*, sec. 330, comment i, made applicable to amendment by sec. 331, comment c. There is no reason why the federal common law of employee benefits, called into being by ERISA, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987), cannot employ similar principles to determine whether an employer has validly exercised its reserved right to amend, if and when the question is presented.[7]

Accordingly, the Court should hold, as to the first question presented, that the language of the Curtiss-Wright plan satisfies the minimum requirements of ERISA section 402(b)(3) by providing a procedure for amending the plan, *i.e.*, action by Curtiss-Wright, and identifying the person with authority to amend, *i.e.*, Curtiss-Wright. Such a holding would remove the need to consider the second question presented – the appropriate remedy for a violation.

II. THERE IS NO BASIS IN THE LANGUAGE, STRUCTURE OR POLICY OF ERISA FOR STRIKING AN AMENDMENT MERELY BECAUSE THE AMENDMENT PROCEDURE WAS INSUFFICIENTLY DETAILED.

According to the decision below, an employee benefit plan that expressly reserves to the employer the right to

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[7] We would also note that, while the U. S. Department of Labor has issued no regulations under section 402(b)(3), it has issued regulations under ERISA section 412, 29 U.S.C. § 1112 (the bonding requirement of ERISA), which explicitly recognize that individuals may act on behalf of a corporation, in the performance of the corporation's duties with respect to an employee benefit plan under ERISA, with either actual or apparent authority. 29 C.F.R. § 2580.412-3(a)(3).

amend, but whose procedure is not sufficiently detailed to satisfy ERISA section 402(b)(3), cannot be amended (except to upgrade the amendment provision to comply with the decision below). In practical effect, the decision below holds that the remedy for a violation of section 402(b)(3) is to invalidate all amendments purportedly adopted under the plan's insufficiently detailed procedure. Such a remedy elevates form over substance and has no basis in the language, structure or policies of ERISA.

Lawyers all too quickly label any unfavorable decision an elevation of form over substance – to the point where the expression has lost much of its meaning. This, however, is the type of situation for which the expression was coined. The substance of the matter is that the Curtiss-Wright plan *does* expressly reserve to Curtiss-Wright the right to amend the plan. If that provision falls short of the ERISA requirement, the shortfall is one of form, not substance. Holding an amendment invalid, even though it was adopted pursuant to an express reservation of authority to amend, would truly elevate form over substance.[8]

ERISA does not require any such elevation. ERISA prescribes no specific remedy for violation of section 402(b)(3). Nowhere does ERISA state, or even suggest,

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[8] In addition, the Curtiss-Wright plan expressly reserved the right to terminate the plan, which, at common law, may include the right to amend. 4a; *Restatement (Second) of Trusts*, § 331, comment g (1959). ERISA imposes no requirement with regard to termination procedures and, with regard to welfare plans, imposes no restrictions on termination. Curtiss-Wright could therefore have achieved the same result – without any possibility of challenge under ERISA – by terminating the plan and immediately replacing it with the amended plan, illustrating once again that the decision below elevates form over substance.

striking an amendment adopted pursuant to an amendment procedure that is insufficiently detailed.[9]

Like all other violations for which ERISA does not specify a remedy, a violation of section 402(b)(3) is subject to the general remedies for miscellaneous violations of ERISA, as set forth in ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). Section 502(a)(3) says nothing about striking an amendment, however. It provides only for an injunction against the violation or other equitable relief:

> (a) A civil action may be brought –
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.[10]

As this Court has held, section 502(a)(3) does not authorize an injunction or "other appropriate equitable relief" at large, but only for the purpose of redressing violations of (or enforcing) ERISA (where, as here, no violation of the plan is claimed). *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S. Ct. 2063 (1993). The question is, what is the violation of ERISA?

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[9] By comparison, ERISA does prescribe specific remedies for certain violations, such as restitution for breach of fiduciary duty (ERISA section 409, 29 U.S.C. § 1109) and a penalty of up to $100 per day for failure to provide documents upon written request of a participant (ERISA section 502(c)(1), 29 U.S.C. § 1132(c)(1)).

[10] The Secretary of Labor is given similar enforcement authority in section 502(a)(5), 29 U.S.C. § 1132(a)(5), subject to certain restrictions specified in section 502(b), 29 U.S.C. § 1132(b).

In this case, if the language of the Curtiss-Wright plan violated section 402(b)(3), the violation would be a failure of the plan to include a sufficiently detailed provision regarding amendment. An injunction against the violation would be a court order requiring the sponsor (or whoever has authority to amend the plan) to upgrade the amendment provision to include greater detail. "Other equitable relief" might include the court's reforming the plan so as to include the required level of detail if the sponsor refused to do so. In no event would participants be awarded monetary relief as required by the decision below.[11]

Besides following *Mertens*, that approach would conform to this Court's analysis in *Local 144 Nursing Home Pension Fund v. Demisay*, ___ U.S. ___, 113 S. Ct. 2252 (1993). In *Demisay*, the Court observed that injunctive relief against a violation of section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, depends on what the "violation" is. If the violation is payment of money to, or receipt of money by, a trust fund, the federal authority to enjoin violations extends no further than enjoining such payment or receipt; it does not authorize federal judicial oversight of the administration of the trust fund. In a like manner, since the violation of section 402(b)(3) (if there is one) is failure to include in the plan document adequate detail regarding amendment, injunctive relief should be limited to requiring the sponsor to add the required detail, not interfering with the administration of the plan by granting benefits to a class of participants who are not entitled to benefits.

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[11] This would accord with the decisions of the other two Courts of Appeals that have addressed the issue. *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291 (4th Cir. 1993), and *Adams v. Avondale Indus., Inc.*, 905 F.2d 943 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990).

The structure and purpose of ERISA confirm that the appropriate remedy is improvement of the plan, not monetary relief to participants. Although the decision below is predicated on the participant's right to know what the terms of the plan are, section 402(b)(3) does not appear among the ERISA provisions regarding disclosure of information to participants. Disclosure of information to participants is found in Part 1 of Title I of ERISA – sections 101-111, 29 U.S.C. §§ 1021-1031. The various disclosures include the summary plan description, summaries of material modifications as needed, summary annual reports, a statement of accrued and vested benefits, and a copy of the information pertinent to a particular participant on the registration statement required under section 6057 of the Internal Revenue Code of 1986.[12] None of those disclosures includes any reference to, or description of, the plan's provision regarding amendments. Nor is any such disclosure required by any regulation under those sections.

Rather than in the provisions regarding disclosure to participants, section 402(b)(3) appears in the provisions regarding the performance of fiduciary responsibilities by fiduciaries – Part 4 of Title I. Congress evidently conceived of the amendment requirement, not in terms of disclosure to participants, but in terms of the fiduciary's performance of his fiduciary functions. And the placement of section 402(b)(3) *within* the fiduciary provisions makes its mission clear.

It is instructive to step back and look at section 402 as a whole, 29 U.S.C. § 1102. Section 402 begins with section

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[12] ERISA secs. 101(a), 102(a)(1), 104(b)(3), 105(a) and 105(c), 29 U.S.C. §§ 1021(a), 1022(a)(1), 1024(b)(3), 1025(a) and (c). The last requirement refers to Schedule SSA, which is attached to the annual Return/Report of Employee Benefit Plan – Form 5500.

402(a), which requires that each plan be maintained pursuant to a written instrument under which the "authority to control and manage the operation and administration of the plan" is vested in "one or more named fiduciaries."

Then section 402(b) lists four provisions that each plan must have:

(1) "a procedure for establishing and carrying out a funding policy and method";

(2) a description of any procedure "for the allocation of responsibilities for the operation and administration of the plan";

(3) "a procedure for amending such plan, and for identifying the persons who have authority to amend the plan"; and

(4) specification of "the basis on which payments are made to and from the plan."

Finally, section 402(c) lists three optional plan provisions, permitting an individual to serve in more than one fiduciary capacity, permitting fiduciaries to employ advisors, and permitting a fiduciary to appoint an investment advisor.

The unifying theme of section 402 is committing the operation and administration of each plan to an identifiable person and providing that person with the tools to do the job – a procedure for establishing and carrying out a funding method (so the fiduciary knows how to manage the plan's finances), a procedure for allocation of fiduciary responsibilities (so the fiduciary can delegate), a procedure for amending the plan (so the fiduciary can determine what the terms of the plan are), and specification of the basis on which payments are made to and from the plan (so the fiduciary knows where to collect contributions and who is entitled to benefits). From the structure of section 402, there can be little doubt that Congress intended section 402(b)(3) primarily for the

benefit of the fiduciary administering the plan, not the participants.[13]

Stepping back one more step, and seeing how section 402 interacts with section 404, 29 U.S.C. § 1104, provides confirmation. Coming just two sections later, section 404(a)(1), 29 U.S.C. § 1104(a)(1), sets forth the duties of a fiduciary, prominent among them being the duty to administer the plan in accordance with the plan document:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
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> . . .
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or Title IV.

Needless to say, the fiduciary cannot abide by the terms of the plan unless he knows what the terms of the plan are. In context, it is clear that section 402(b)(3) was intended as a tool for the fiduciary to know what the terms of the plan are.

Once it is understood that the purpose of section 402(b)(3) is to enable the fiduciary to administer the plan, rather than to inform the participants, several consequences follow that relate directly to relief for violation of

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[13] The Conference Report on ERISA specifically confirms this conclusion, illustrating with respect to section 402(b)(1):

> [E]ach plan is to provide a procedure for establishing a funding policy and carrying out the plan objectives. This procedure is to enable the plan fiduciaries to determine the plan's short- and long-run financial needs and communicate these requirements to the appropriate persons.

H.R. Rep. No. 93-1280, 93rd Cong., 2d Sess. 297-298, *reprinted in* 3 *Legislative History* at 4564-65 (August 12, 1974).

section 402(b)(3). First, the determination of whether the plan provision regarding amendment is sufficient should be left to the fiduciary, at least in the first instance. If the plan provision is sufficient for the fiduciary to carry out his fiduciary function, the primary purpose of ERISA will have been fulfilled.[14]

Second, if the fiduciary concludes that the plan provision regarding amendment is insufficient to enable the fiduciary to judge the validity of amendments, the fiduciary may sue the sponsor of the plan (usually the employer) under section 502(a)(3) for injunctive relief – compelling the employer to upgrade the amendment provision to satisfy section 402(b)(3). (It is unlikely, of course, that a fiduciary who informed an employer of this problem would ultimately be forced to sue.)

Third, if a participant or beneficiary of the plan is actually affected by a plan amendment and takes a different view from the fiduciary as to the effectiveness of the plan amendment, the claim and appeal procedures of ERISA should be used and exhausted. ERISA sec. 503, 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1. Thereafter, a disappointed participant or beneficiary may sue the fiduciary under section 502(a)(1)(B), as with any other claim for benefits that is denied.

In this way, the policies of ERISA will be furthered to (i) commit plan administration, including questions of plan interpretation, to fiduciaries in the first instance (rather than to the federal courts) and (ii) encourage private resolution of disputes within the framework of the ERISA-mandated claim and appeal procedures. In

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[14] This also addresses the question of disclosure of the terms of the plan to participants, since it is the *fiduciary* who is responsible for disclosing them to participants. *See* n. 12, *supra*.

such a framework, it should be unnecessary even to consider striking plan amendments.

With regard to remedy, the most important point to remember is that the plan *does* reserve to Curtiss-Wright the right to amend. If the wording is not so detailed as ERISA section 402(b)(3) requires, the remedy should be to improve the wording, not to pretend that the plan contains no reservation of authority to amend (and award monetary relief to the participants), especially where neither the language, the structure, nor the policy of ERISA requires such a drastic result.

III. THE DECISION BELOW UNSETTLES THE TERMS OF MILLIONS OF EMPLOYEE BENEFIT PLANS, IMPOSING UPON EMPLOYERS SIGNIFICANT COSTS NOT INTENDED BY CONGRESS AND BURDENING THE FEDERAL COURTS WITH A NEW, ENTIRELY UNNECESSARY CLASS OF ERISA LITIGATION.

The practical effect of the decision below is to void all amendments to most single-employer benefit plans since the enactment of ERISA. The consequences of that result are broad, given the millions of employee benefit plans likely affected, and extremely serious. If it is true that "[e]xpediency may tip the scales where arguments are nicely balanced,"[15] expediency lays a heavy hand on petitioner's side of the scales.

As to the breadth of the impact, the universe of single-employer pension and welfare plans covered by ERISA is large indeed. It comprises both pension plans (pension, profit sharing, 401(k), ESOP, etc.) and welfare plans (medical, life insurance, disability, severance, etc.).

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[15] *Woolford Realty Co. v. Rose*, 286 U.S. 319, 330 (1932) (Cardozo, J.).

According to a recent tabulation by the U. S. Department of Labor, there were 873,000 single-employer pension plans covered by ERISA in 1987. In addition, in 1987, there were an estimated 4,500,000 welfare plans covered by ERISA.[16]

Use of the conventional language is widespread – indeed, almost universal – because, until the decision below, no employer or drafter had any reason to doubt the sufficiency of the conventional language. The U. S. Department of Labor, which is responsible for interpreting and enforcing ERISA, has issued no regulation on the subject, no ruling, no advisory opinion, no hint of any kind that the conventional language might be insufficient under ERISA. Except for the decision below, the conventional language has survived almost 20 years of ERISA litigation, not only without being invalidated, but without even being *challenged*, as far as we can determine.

The breadth of the impact is emphasized by the frequency with which amendments are adopted; employee benefit plans undergo regular and, in many cases, constant change. These amendments serve a variety of purposes, such as (i) updating the plan to comply with changes in the law and regulations, (ii) rearranging benefits to better meet the needs of employees, (iii) improving or reducing benefits in accordance with the employer's ability to pay, and (iv) conforming the plan to changes in the employer's situation, such as acquisitions and divestitures. Aside from a relative handful of brand new plans,

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[16] M. Brossman and K. Kamen, *Employee Benefit Issues 1993* at 386 (International Foundation of Employee Benefit Plans, 1993). Figures for pension plans come from the annual reports that plans are required to file with the Department of Labor. Since many small welfare plans are exempt from filing the annual report, the figure for welfare plans is an estimate by the Department of Labor.

it is doubtful that there is any single-employer benefit plan covered by ERISA – whether pension or welfare – that has not been amended repeatedly since ERISA.

For example, in the 19 years since enactment of ERISA in 1974, Congress has changed the law applicable to pension and profit sharing plans that are intended to qualify under section 401(a) of the Internal Revenue Code, 29 U.S.C. § 401(a), at least a dozen times, not to mention constant changes in regulations.[17] In response, employers have regularly exercised their authority to amend, under the conventional reservation language of their plans, to keep the plans in compliance with section 401(a).

For another example, the vast majority of medical plans for active employees have been amended in recent years in order to implement cost containment features, such as employee contributions, deductibles, co-pays, preferred provider organizations, etc.[18] It is generally

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[17] *See, e.g.*, Omnibus Budget Reconciliation Act of 1993, P. L. 103-66; Unemployment Compensation Amendments of 1992, P. L. 102-318; Omnibus Budget Reconciliation Act of 1989, P. L. 101-239; Technical and Miscellaneous Revenue Act of 1988, P. L. 100-647; Omnibus Budget Reconciliation Act of 1987, P. L. 100-203; Tax Reform Act of 1986, P. L. 99-514; Retirement Equity Act of 1984, P. L. 98-397; Tax Reform Act of 1984, P. L. 98-369; Tax Equity and Fiscal Responsibility Act of 1982, P. L. 97-248; Economic Recovery Tax Act of 1981, P. L. 97-34; Miscellaneous Revenue Act of 1980, P. L. 96-605; Revenue Act of 1978, P. L. 95-600; Tax Reform Act of 1976, P. L. 94-455.

[18] Between 1979 and 1991, the percentage of participants who were required to contribute toward the cost of health care for themselves under ERISA-covered plans nearly doubled – to 51% – and the amount of the employee contribution was raised by 2½ times. Likewise, in 1980, only 3% of participants in medium and large establishments were enrolled in managed care programs; in 1991, 33% were enrolled in managed care

understood that such amendments have been instrumental in holding down the cost of medical plans (at least by slowing the rate of increase in cost) and, therefore, keeping medical plans affordable for employers and employees alike.

There have also been major amendments to medical plans for retirees. According to a recent survey, two thirds of companies made changes in their retiree medical plans in 1991 or 1992, principally because of Statement of Financial Accounting Standards No. 106, adopted in December 1990. Approximately one third of employers surveyed amended their plans to increase the retiree contribution toward medical coverage. Sixteen percent increased deductibles or out-of-pocket maximums. Ten percent changed eligibility standards.[19]

Voiding virtually all amendments adopted since ERISA would have a variety of serious, adverse consequences wholly unintended by Congress in ERISA and will work directly contrary to the intent of Congress in ERISA to promote and encourage employee benefit plans.[20]

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programs. Just from 1986 to 1991, the percentage of participants subject to hospital pre-admission certification rose from 16% to 63%. U. S. Department of Labor, *Monthly Labor Review* at 9 (March 1994).

[19] *Retiree Medical Benefits: Who Are the 1992 Wyatt COMPARE Employers?*, reported at 20 *Pension & Benefits Reporter* (BNA) 1079-1080 (May 17, 1993).

[20] The extent of the retroactive effect depends on the statute of limitations. At a minimum, the decision below voids amendments adopted within the period of the most analogous state statute of limitations, likely a period of at least several years. Employees will undoubtedly argue, however, that the decision below voids all amendments adopted since the effective date of ERISA section 402(b), which is January 1, 1975 (ERISA sec.

Disqualification of a pension or profit sharing plan under section 401(a) of the Internal Revenue Code means that (i) the employer loses the deductions that it took under section 404 of the Internal Revenue Code for contributions to the plan, (ii) the employees must pay federal income tax on the value of their vested interests in the plan (though they receive no money with which to pay the taxes), (iii) the trust becomes a taxable entity and owes federal income tax on its earnings, and (iv) distributions from the plan to employees do not qualify for special tax treatment such as rollover to an individual retirement account. The effect on employers and employees alike can be devastating.[21]

414(a), 29 U.S.C. § 1114(a)), on the theory that the plan administrator has a fiduciary duty to apply the terms of the plan as they exist under law, without regard to any invalid amendments, no matter when they occurred. This principle is analogous to the principle of the common law of trusts that a fiduciary generally may not invoke the statute of limitations against a beneficiary. 1 C. Corman, *Limitations on Actions* (1991) § 9.10; *Restatement (Second) of Trusts* § 219, comments a, c; 2 H. Wood, *Limitation of Actions* (4th Ed. 1916) § 200.

[21] Due to the vigorous and unforgiving enforcement posture of the Internal Revenue Service, disqualification is an immediate, not remote, possibility. Over the past few years, the Internal Revenue Service has been aggressively seeking out plans that have not been amended to comply with recent changes in the law and disqualifying them unless the sponsor agrees to pay very substantial penalties, in some cases ranging into the tens of millions of dollars. Administrative Policy Regarding Sanctions, announced March 26, 1991, Internal Revenue Manual 7(10)54; Employee Plans Closing Agreement Pilot Program ("CAP"), announced December 21, 1990, established as a permanent program on October 9, 1991, Internal Revenue Manual (11)10-80; Voluntary Compliance Resolution Program ("VCR"), Rev. Proc. 92-89, 1992-46 I.R.B. 27, October 28, 1992, extended by Rev. Proc. 93-36, 1993-29 I.R.B. 73, and made per-

Where plan amendments have reduced benefits, employees can be expected to sue to recoup the amount of the reduction. To take one common example, suppose that an employer recently amended its medical plan to convert from a so-called "first dollar" plan (where all medical expenses are covered in full) to a so-called "comprehensive" plan (where the employee must pay a deductible before any expenses are covered and then must make a "co-pay" until the "out-of-pocket maximum" is reached). According to the decision below, if the plan's amendment provision was the conventional reservation of authority, all employees would be entitled to recoup from the plan the deductibles and co-pays that they paid after the amendment.

Where benefits have been eliminated, employees can be expected to sue to recover the full benefits. This case is the perfect example: the employer amended the plan to eliminate medical coverage for retirees but the retirees won full payment of the benefits nonetheless. As noted above, elimination (or reduction) of medical benefits for retirees has been widespread in recent years, accelerating after the promulgation of FAS 106 in December 1990. Yet victory for retirees is virtually automatic under the decision below, thus retroactively denying employers all of the savings that they believed to have been achieved.

Ironically, plan amendments are just as likely to have *improved* the benefits of the plan, but plan administrators, as fiduciaries under ERISA, will be required to roll back

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manent by Rev. Proc. 94-62, 1994-39 I.R.B. 11. See also Rev. Proc. 94-16, 1994-5 I.R.B. 22 (Jan. 12, 1994).

As of March 31, 1994, the IRS had closed 820 cases under CAP involving 330,000 participants; about 170 cases are still pending. IRS has received 650 cases under VCR and 100 under "Standardized VCR" ("SVP") as of April 30, 1994. 21 *Pension & Benefits Reporter* (BNA) at 1091.

the terms of the plan to where they stood before any post-ERISA amendments. As a result, it will be clear that many participants have been paid far more than they were entitled to, under the terms of the plan as now understood in retrospect.

Yet, for obvious reasons, plan administrators will find it impossible, as a practical matter, to recoup these overpayments of benefits. Any attempt to do so will produce lengthy litigation in federal court, likely involving fact-intensive questions of estoppel, for example.[22] In the end, employers likely will be required to absorb these additional costs, resulting in a "heads-I-win, tails-you-lose" double whammy for employers, already reeling under the escalating cost of health care.

Beyond the disastrous impact on millions of plans and employers, the decision below would have a disastrous impact on the federal judiciary, by creating a new, quite unnecessary class of ERISA litigation. This conclusion arises from the role of the plan administrator as a fiduciary under ERISA – a dimension that the decision below did not take into account.

There is no doubt that the plan administrator under ERISA exercises fiduciary responsibility in interpreting and applying the plan. 29 C.F.R. § 2509.75-8. As a fiduciary, the plan administrator is bound by section 404(a)(1)(D), which obligates the plan administrator to adhere to the terms of the plan, *but only to the extent that such terms are consistent with ERISA*. Yet the decision below holds, as a matter of law under ERISA, that plan amendments adopted pursuant to the conventional reservation of authority to amend are *not* consistent with

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[22] Jurisdiction of such actions will lie exclusively in federal court under ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1).

ERISA. ERISA section 404(a)(1)(D) therefore forbids the plan administrator to give them effect.[23]

Under the decision below, therefore, the plan administrator of each affected plan has a fiduciary duty under ERISA to reconstruct the terms of the plan ignoring all such amendments. Moreover, the plan administrator acts in peril of personal liability for any error in applying the decision below to the history of the plan since 1975, since, under ERISA, fiduciary liability is personal, not a liability of the plan. ERISA sec. 409, 29 U.S.C. § 1109; *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, ___ U.S. ___, 113 S. Ct. 2264 (1993). And ERISA section 502(l), 29 U.S.C. § 1132(l), imposes an additional 20% penalty upon the fiduciary personally (unless waived or reduced by the Secretary of Labor).

In the climate of uncertainty created by the decision below, and faced with enormous personal liability, the only prudent course for plan administrators, as fiduciaries under ERISA, will be to apply to a federal district court for instructions as to what the terms of the plan are (and have been since 1975). This Court has expressly recognized the right of a fiduciary under ERISA to apply to a federal court for instructions. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989) ("A trustee who

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[23] The decision below expresses the hope that it can be limited to only those amendments which are challenged by participants, presumably only those which adversely affect participants. 11a, n. 5. That hope is vain; as a fiduciary under ERISA, the plan administrator has a spontaneous, federal statutory duty to determine what the terms of the plan are and then to carry them out, regardless of whether anyone has challenged them. As a fiduciary, the plan administrator simply is not permitted to give effect to plan terms that are unlawful under ERISA.

is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court.")

Needless to say, enmeshing the federal courts in deciding what the terms of most single-employer pension and welfare benefit plans have been over the past 19 years represents a cost to the private sector and a burden to the judiciary that cannot possibly have been intended by Congress in ERISA and can only have the effect of reducing the funds available to actually pay benefits under such plans, as well as discouraging formation of such plans.

It can be readily admitted that these broad and serious effects flow from the retroactivity of the decision below, which may be required under *Harper v. Virginia Department of Taxation*, ___ U.S. ___, 113 S. Ct. 2510 (1993). Alternatively, the Court could affirm without such effects if the Court were to apply its decision prospectively only, in accordance with *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983). It is very safe to say that (i) this case presents "an issue of first impression whose resolution was not clearly foreshadowed," *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), (ii) prospective application of the new rule will not retard its application in light of its history, purpose and effect, *id.* at 107, because it is designed to assist fiduciaries, not participants, and (iii) the decision "could produce substantial

inequitable results if applied retroactively," *id.* at 107, as just described in detail.[24]

CONCLUSION

In ERISA, Congress sought and achieved a balance between the rights of employees and the burdens on employers, recognizing that misguided regulation could easily go overboard and, ironically, lead to the elimination of employee benefit plans. *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990). This Court has repeatedly upheld the balance that Congress achieved in ERISA against those who would upset it by imposing additional burdens on employers, and, for the foregoing reasons, the time has come to do so again:

1. The Court should hold that the reservation of authority to amend in the Curtiss-Wright plan satisfies ERISA section 402(b)(3). Accordingly, the decision below should be reversed.

2. Alternatively, if the Court concludes that the reservation of authority to amend in the Curtiss-Wright plan is not sufficiently detailed to satisfy ERISA section 402(b)(3), the Court should nevertheless hold either that

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[24] This case actually makes rather a stronger case for prospective application than did *Manhart*. In *Manhart*, some government agencies had opined that the unequal contribution approach was unlawful; here, neither the U. S. Department of Labor nor any other government agency has ever suggested that the conventional language was insufficient. In *Manhart*, the challenged conduct was limited to those relatively few pension plans which did not provide equal benefits for men and women; here, the challenged language is spread densely throughout the universe of both pension and welfare plans. In *Manhart*, the Court confronted (and dispensed with) a presumption in favor of retroactive relief under Title VII; here, there is no such specific presumption to be overcome.

striking the amendment is an inappropriate remedy under ERISA or that such relief should be applied prospectively only. Accordingly, the decision below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION,
Petitioner,
v.
FRANK C. SCHOONEJONGEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether petitioner's health benefit plan, which reserved to the Company the right to amend the plan, complied with Section 402(b)(3) of the Employee Retirement Income Security Act, 29 U.S.C. § 1102(b)(3), which requires every employee benefit plan to "provide a procedure for amending [the] plan and for identifying the persons who have authority to amend the plan . . . ."

2. Whether, if petitioner's health benefit plan did not comply with Section 402(b)(3), this Court should apply the rule established in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 721-22 (1978), *i.e.*, that when a newly-announced rule of law "represents a marked departure from past practice" in the administration of employment benefit plans, the ruling should not be applied retroactively unless Congress has plainly commanded that result.

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BRIEF FOR MANUFACTURERS ALLIANCE FOR PRODUCTIVITY AND INNOVATION, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief is submitted by Manufacturers Alliance for Productivity and Innovation, Inc. ("Manufacturers Alliance" or "Alliance") as *amicus curiae* in support of petitioner.[1]

INTEREST OF AMICUS CURIAE

Manufacturers Alliance is a nonprofit research organization supported by some 500 manufacturing companies from a broad range of industries. These members range in size from relatively small, single-product manufacturers

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

with annual sales revenues in the $5 million-$50 million range to very large, highly diversified manufacturers and providers of business and technical services with annual sales revenues exceeding $1 billion. Roughly one-third of the Fortune Magazine 500 largest U.S. industrial companies are members of Manufacturers Alliance, including 23 of the companies ranked in the top 50. Petitioner in this case, Curtiss-Wright Corporation ("Curtiss-Wright"), is a member of the Alliance. The Alliance participated as *amicus curiae* in this Court in *Westinghouse Elec. Corp. v. EEOC*, 493 U.S. 801 (1989), in the court of appeals in *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.*, 925 F.2d 174 (7th Cir. 1991), and before the National Labor Relations Board in *Electromation, Inc.*, 309 NLRB 990 (1992), *enf'd*, 147 L.R.R.M. 2257 (7th Cir. 1994).

The legal standards adopted by the court of appeals in this case call into question well-established employer methods of modifying employee benefit plans, and threaten the sound administration of the plans sponsored by the members of Manufacturers Alliance. Alliance members have substantial practical concerns about the result reached below. In October 1994, Alliance economist Patricia A. Buckley, Ph.D, conducted a survey of the Alliance's two Human Resources Councils—peer discussion groups comprised of many member companies' senior human resources executives. The survey revealed that, although nearly all have explicitly reserved the right to amend their benefit plans, more than 90 percent of the responding companies had at least one benefit plan with an amendment procedure likely to be held invalid under the unprecedented standard announced by the Third Circuit. Furthermore, 15 percent of those companies with potentially invalid plans maintain 50 or more employee benefit plans, and another 18 percent maintain between 20 and 49 plans each. More than half have made 20 or more changes to their benefit plans in the past five years, and over one-quarter have made more than 50

changes. Indeed, not a single respondent company indicated that it had made no changes to its plans. If the decision below is not reversed, each of those plan amendments will be suspect, and the fiduciaries who have administered those plans, in good faith, based on the written terms of those amendments, face the possibility of immense civil liability—and the near certainty of civil litigation. Indeed, three Alliance members have already reported lawsuits premised at least in part on the Third Circuit's decision in this case.

In an earlier survey of the Alliance's Human Resources Councils, compiled by Dr. Buckley in July 1994, 73 percent of the responding companies reported that they have amended their plans to reduce or terminate benefits provided to some group of active or retired employees. Fourteen of the 81 companies responding to that survey estimated that their potential liability to affected employees and retirees could exceed $10 million.

These potential liabilities are not the result of inattention or inadvertence by plan drafters, but rather arise from the court of appeals' unanticipated and unprecedented departure from long-established benefits practice. As explained in further detail below, the Internal Revenue Service and pension and welfare experts have long recommended that plan sponsors incorporate into their plans the amendment language condemned by the courts below or language functionally identical to it. Substantial, sophisticated corporate entities such as the members of Manufacturers Alliance (over one-half of the companies responding to the Alliance's surveys had annual sales in excess of $1 billion and more than 5,000 employees) have consistently relied on advice from the nation's experts on employee benefit plan design, and still they were unable to predict the peculiar approach that the court of appeals took in this case. Now, twenty years after enactment of the federal statute governing employee benefit plans, they, along with thousands of other employers, are exposed to

potential liability based on an unjustified set of judicially-imposed rules.

STATEMENT OF THE CASE

The Employee Retirement Income Security Act ("ERISA") generally permits the sponsor of an employee welfare benefit plan to amend or terminate that plan in whole or in part. This case concerns the proper interpretation and application of the statutory requirement that ERISA plans provide a procedure for making amendments. In its most immediate sense, the case involves the validity of an amendment to petitioner Curtiss-Wright's health plan and the sufficiency of the amendment provision in Curtiss-Wright's plan documents.

In a broader sense, however, this case has profound implications for employers, employees, and the American economy. The decision below threatens the reliability of amendments made over a 20-year period to literally millions of employee benefit and pension plans. The decision thus jeopardizes the viability of many of those plans—plans to which most Americans look for their health care, their retirement incomes, or both. The rule of law adopted by the court of appeals in this case, if permitted to stand, would impose unmanageable administrative burdens—and the potential for enormous civil liability—on the fiduciaries responsible for administering these plans and on the plans' employer sponsors. This draconian result cannot be justified by the terms of the statutory provision at issue, or the purpose for which it was enacted.

1. *The Curtiss-Wright Plan*

In response to the passage of ERISA, petitioner Curtiss-Wright established in 1976 an employee benefit plan "Constitution," which was intended to function as an umbrella document to govern the administration of several Curtiss-Wright employee benefit plans. The Constitution explicitly reserved to "[t]he Company . . . the

right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions" of the Constitution or the plans petitioner intended to create. Pet. App. 4a.

One of the benefit plans subject to this governing Constitution provided health benefits to some of the Company's employees and retirees. Periodically over the years, the Company amended the plan to account for changes in governing law, to reflect a change in the identity of the insurance carrier used by the plan, and for other reasons. To memorialize these changes, the Company periodically issued new Summary Plan Descriptions ("SPDs") to all of the participants and beneficiaries of the plan. Each SPD described the benefits available under the amended plan. Into each SPD—and a number of other communications sent to plan beneficiaries over the years—petitioner explicitly incorporated its right to amend the plan at any time.[2] Pet. App. 4a-5a.

In 1983, petitioner amended the plan again for a variety of reasons, including to reflect a change in the plan's insurance carrier and to insert the following language regarding the termination of retiree benefits: "Coverage under this Plan will cease for retirees and their dependents upon termination of business operations of the facility from which they retired." Pet. App. 5a-6a. Sometime thereafter, following the loss of a major defense contract, petitioner closed its facility in Wood-Ridge, New Jersey. Based on the quoted 1983 amendment to the governing plan document, petitioner then ceased to provide health benefits to those retirees who had last served the Company at the Wood-Ridge facility. This lawsuit ensued.

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[2] From the record, it appears that none of these periodic amendments was challenged until the complaint was filed in this case.

2. *The District Court Proceedings*

A group of Curtiss-Wright retirees and retiree dependents brought this action on their own behalf and on behalf of a class of affected beneficiaries. They alleged, among other things, that their health benefits had become vested under ERISA and thus were not subject to termination. They also complained that Curtiss-Wright had not properly amended its health plan in 1983. After lengthy proceedings, the district court issued a number of findings regarding the pertinent plan documents and the 1983 amendments, most of which are not being challenged here.

First, the district court held that Curtiss-Wright had explicitly and effectively reserved the right to amend or terminate the health benefit plan on which plaintiffs relied. Pet. App. 40a. Second, the court ruled that plaintiffs' health benefits had not become vested under any legal theory. *See, e.g.*, Pet. App. 36a. Third, the court acknowledged that Curtiss-Wright, as a corporate entity, had attempted to amend its benefit plan in 1983 and had added to the SPD the language quoted above regarding termination of benefits. The court held, however, that the amendment was ineffective because it "was not effectively promulgated." Pet. App. 37a-38a.

The district court based this conclusion on Section 402(b)(3) of ERISA, 29 U.S.C. § 1102(b)(3), which requires that "[e]very employee benefit plan . . . provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan . . . ." The court reasoned that the plan language establishing the right of "the Company" to amend the plan "at any time and from time to time" insufficiently delineated the details of the procedures the Company was to use in exercising this right. Thus, in resolving plaintiffs' claim to benefits, the court concluded that it was obligated to "look to the 1983 [SPD] without such amendment as the governing document." Pet. App. 38a. Because—absent

the amendment—plaintiffs were eligible for benefits under the plan, the court entered judgment in plaintiffs' favor for $2,681,086, the full value of plan benefits for each beneficiary measured from the time that benefits were terminated in 1984 through the date of the district court's ruling in 1990. Pet. App. 105a-106a.

3. *The Court Of Appeals Decision*

The court of appeals affirmed. First, it held that the language of Curtiss-Wright's plan, which reserved to "the Company" the right to amend the plan "at any time and from time to time" failed to identify "the persons who have authority to amend the plan." The opinion did not even mention the fact that a company or corporation is, by statutory definition, a "person" for purposes of ERISA. *See* Section 3(9), 29 U.S.C. § 1002(9). Pet. App. 7a-9a.

Second, the court of appeals agreed with the district court that the 1983 amendment was invalid due to procedural irregularities. The members of the panel differed, however, in their reasons for reaching this conclusion. For her part, Judge Roth conceded that the term "Company" as used in the plan's amendment provision necessarily implied a procedure for making an amendment, *i.e.*, that the term reasonably comprehended any "action taken by the board of directors or whomever of the company has the authority to take such action under the corporation law of the state of incorporation of the company in question." Pet. App. 8a-9a n.3. She concluded, however, that the amendment at issue was invalid because it was not the direct work product of the Curtiss-Wright board of directors. *Id.*

The majority was unwilling to go even this far. It ruled that the 1983 amendment was invalid because the plan provision authorizing amendments did not sufficiently detail the procedures that the amending "person" was supposed to follow in effecting an amendment. The court

gave no hint, however, as to precisely how detailed the required delineation of procedures would have to be to pass muster. The court's analysis of the statutory language at issue was largely confined to these sentences: "A simple reservation of a right to amend is not the same as a 'procedure for amending [the] plan' . . . . A primary purpose of Section 402(b)(3) is to ensure that all interested parties will know how a plan may be altered . . . . The reservation in the Curtiss-Wright plan does not accomplish [this] objective[] and acceptance of Curtiss-Wright's argument would render requirements of Section 402(b)(3) essentially meaningless." Pet. App. 7a-8a.

The court was unwilling, however, to condemn *all* amendments made pursuant to amendment procedures that fail to meet the newly-announced standard. Rather, it declared that the only amendments that are invalid are those with terms that are "advantageous to the sponsor's interest"—a standard that the court did not explain in the opinion. Pet. App. 11a n.5. Finally, the court permitted Curtiss-Wright one "free bite" at an amendment under its allegedly defective amendment procedures, so long as it used that opportunity to rectify, prospectively, the perceived deficiencies in the plan's amendment provision. Pet. App. 11a.

SUMMARY OF ARGUMENT

I.

The court of appeals in this case combined an impractically broad reading of a portion of ERISA and an unjustifiably restrictive reading of the benefit plan language at issue to reach a result that, if generally adopted, would impose unmanageable administrative burdens on the vast majority of employee benefit plans in the United States. Even more troubling, the financial stability of many of these plans would be threatened by the rule adopted by the court of appeals.

Apart from these serious practical ramifications, the decision below is not well-grounded in either the text of the statute or its broader purposes. The rule of law announced by the court of appeals rests on an inappropriately literalistic reading of the language of Section 402 (b)(3) of ERISA and an inexplicable refusal to read that provision *in pari materia* with the related sections of the statute and the commonly accepted principles of corporate and trust law from which the statute evolved. Section 402(b)(3) requires that the relevant plan documents identify the "person" authorized to amend the plan and the procedure to be used in making an amendment. The plan at issue here identified the Company as the "person" with the power to amend—ERISA defines "person" to include corporations and thus explicitly permits a company to be the amending entity—and the plan language necessarily comprehended the procedure that the Company used in making the amendment. Any plan beneficiary reading the relevant plan language would have understood immediately that the Company had the power to amend the plan and would have recognized that the amendment at issue in this case reflected the Company's intent to exercise that authority. ERISA demands no more.

II.

Even if this Court were to adopt the unprecedented standard of specificity required by the Third Circuit, and to conclude that petitioner's plan drafters were insufficiently prolix when they reserved the Company's right to amend the plan, the Court should be reluctant to embrace the court of appeals' further conclusion—that any plan amendment "advantageous to the plan sponsor" promulgated pursuant to an inadequately described amendment procedure is necessarily void and unenforceable. This Court has previously noted on more than one occasion the mischief that can accompany the retroactive application of a new rule of law that fundamentally alters the requirements for administering employee benefit plans.

Indeed, the Court has broadly stated that "the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." *Florida v. Long*, 487 U.S. 223, 236 (1988), *quoting Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 720-23 (1978); *see also Nachman Corp. v. PBGC*, 446 U.S. 359, 368-69 (1980).

In this case, retroactive application of the Third Circuit's standard would pose administrative problems and potential liabilities so immense that they defy ready quantification. The great majority of employee welfare plans (such as health care plans) and a great many pension plans in use in the United States today operate—and have operated, since the passage of ERISA in 1974—under amendment provisions functionally identical to petitioner's. These plans have been amended with great regularity over the past two decades for a variety of reasons, frequently to bring them in line with the numerous changes in governing law and, in the case of health plans, to contain costs that have been rising sharply in recent years.[3] To ascertain what each amendment added or deleted; whether, on balance, that amendment was "advantageous to the plan sponsor;" which employees were affected by each change; and what the cost or value of each amendment might have been to each participant, would be a task of incalculable complexity. Moreover, many of the affected plans (including all of the affected pension plans) are funded in whole or in part with employer contributions

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[3] Between 1985 and 1990, for example, the medical component of the Consumer Price Index ("CPI") rose at a 7.5 percent annual rate, a rate of increase nearly double the rate of increase of the CPI as a whole. *Economic Report of the President, February 1994: Annual Report of the Council of Economic Advisers*, United States Government Printing Office, table B-59, p. 335. By 1990, the average employer's share of medical and medically related costs per employee had surpassed $3100. *U.S. Industrial Outlook 1993*, U.S. Department of Commerce, International Trade Administration, at p. 42-2.

based on finely-tuned actuarial assumptions; the retroactive imposition of large unanticipated liabilities on these funds threatens their very existence. Accordingly, if this Court is inclined to adopt the Third Circuit's reading of Section 402(b)(3), it should do so prospectively only, grandfathering the amendment at issue in this case and all of those made prior to the date of this Court's decision.

ARGUMENT

I. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 402(b)(3) IS AT ODDS WITH THE LANGUAGE OF THE STATUTE, ITS PURPOSES, AND THE CONSTRUCTION IT HAS BEEN GIVEN UNIFORMLY BY THE INTERNAL REVENUE SERVICE AND THE BENEFITS COMMUNITY

In its very brief discussion of the issue, the court of appeals indicated that its conclusions regarding the meaning of Section 402(b)(3) were compelled by the language of the provision and its intended purpose. In fact, neither factor compels, or even significantly recommends, the construction adopted below.

The flaws in the Third Circuit's reasoning are most evident in the court's conclusion that despite advising interested readers that "the Company" was authorized to amend the plan, petitioner nonetheless failed to identify "the person" with the authority to amend. ERISA *explicitly* defines the term "person" to mean "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." Section 3(9), 29 U.S.C. § 1002(9). Since a "company" is, by definition, a "person" within the meaning of the statute, petitioner's plan language plainly named the "person" authorized to amend the plan; the court of appeals' contrary decision is inexplicable.

The decision below is similarly faulty with respect to the "procedure" requirement of the statute. The court of

appeals, declaring "that all interested parties [should] know how a plan may be altered and who may make such alterations," demanded that the plan document describe in detail the precise maneuvers required for corporate action. Pet. App. 8a. To be sure, a principal function of Section 402 is to permit plan participants and beneficiaries to determine what their benefits are and to assess the degree to which they may rely on those benefits in ordering their affairs. But anyone reading the language of the Curtiss-Wright plan would have known immediately that the benefits it provided were reliable only so long as the plan was not amended to change or eliminate them, that the Company reserved the right to make just this sort of amendment, and that it could do so at any time.

In a similar vein, respondents assert that Section 402 (b)(3) serves "the need for due process in the amendment of plan terms . . . ." Br. in Opp. at 10. The notion is fundamentally flawed. Section 402 does not purport to guarantee anyone "due process," but merely requires that whatever amendment method the sponsor intends to use be identifiable from reading the plan document. No opportunity to be heard is required, and the statute does not establish any procedural minimums. Indeed, even under the Third Circuit's decision, a plan could permit the company president to make amendments for any reason or no reason at all, as long as the plan provided a sufficiently detailed description of whatever "procedures" the president would use in doing so. Similarly, ERISA imposes no standards for evaluating the wisdom or logic of a plan amendment. In amending a plan, an employer acts as a settlor, not a fiduciary. It thus has the freedom of choice accorded a settlor in determining who will receive benefits and what benefits will be provided. Considerations of "substantive due process" play no role in evaluating plan amendments under the statute. *Cf. United Mine Workers Health and Retirement Plan v. Robinson*, 455 U.S. 562 (1982) (ERISA does not permit courts to police collectively bargained terms of health

benefits plan for "reasonableness"); *Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 133 (3d Cir.), *cert. denied*, 114 S. Ct. 622 (1993); *Musto v. American Gen. Corp.*, 861 F.2d 897, 911 (6th Cir. 1988) (employer is not acting as fiduciary in deciding the terms of a plan; employer may terminate plan or benefits previously available to certain beneficiaries without violating ERISA's fiduciary standards), *cert. denied*, 490 U.S. 1020 (1989).

It is unclear precisely what the court of appeals believed the "procedure" clause of Section 402(b)(3) to mean. Petitioner's document identified the party with the power to amend ("the Company"), and the time at which the Company could act ("at any time and from time to time"). Moreover, given Section 402(a)'s explicit command that the terms of the plan be in writing, beneficiaries plainly knew *how* amendments were to be made, *i.e.*, in writing. It will be difficult for an employer to know how to comply with the Third Circuit's standard, while still retaining the flexibility to which it is entitled under ERISA. To be sure, the employer could vest the amendment power in a single office or entity (such as a pension committee or the board of directors), but such a provision would restrict the employer's freedom of action in a way that is not compelled by the statute. Conversely, the employer could undertake to list each method by which it might conceivably choose to act at some point in the future, but the resulting amendment procedure would be cumbersome at a minimum and would do little to provide beneficiaries and participants with the notice that apparently motivated the decision below.

Moreover, the "procedure" requirement of Section 402(b)(3), by its terms, relates only to *amendments*, not to plan terminations, and the court of appeals conceded that petitioner lawfully could have terminated the entire plan and established a new one for which respondents were not eligible, all without implicating Section 402(b)(3). Pet. App. 12a. Thus, adding more detail to the amend-

ment procedures as required by the court of appeals would do nothing to increase the permanence or "reliability" of the benefits contained in the plan, would guarantee no hearing to plan beneficiaries, and would not limit in any practical sense the prospective freedom of plan sponsors to reduce or eliminate benefits.

Nor is there any basis for Judge Roth's assertion that the amendment at issue in this case was not an action taken by "the Company." As Judge Roth recognized, a corporation is not a corporeal entity; it acts—can act—only through its officers, agents, and employees. Thus, when an interested reader of the relevant plan documents sees that "the Company" is empowered to make plan amendments, he or she knows that the benefits the plan provides may be changed or eliminated whenever "the Company" acts in accordance with its existing structure of corporate governance. Here, Curtiss-Wright's officers and agents promulgated the amendment at issue, as they had promulgated the 1976 plan Constitution and the subsequent SPDs and plan-related documents. Although Judge Roth condemned the 1983 amendment because it was not the direct work product of the Curtiss-Wright board of directors, petitioner, respondents, and the district court *all* agree that petitioner's board of directors had *never* acted on these sorts of issues in the past, but rather that authority for plan matters had been delegated to some of the Company's executives.[4] There can be no disagreement: 1) that petitioner intended to act as "the Company," through its agents, in amending the plan;

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[4] Petitioner argues that this amendment, and all its prior amendments, were made by its Corporate Director of Benefits and its Labor Counsel with the approval and authorization of its Executive Vice President. Pet. 5. Respondent maintains that a working committee of Company executives—including these same three individuals—had approved petitioner's prior amendments. Pet. App. 38a; J.A. 73-74. The district court did not resolve this dispute, simply noting that the evidence "suggested" that respondent may have been correct. *Id.* In any event, it is agreed that the board of directors was never involved.

2) that, in the past, it had relied on these (or other) agents for performing the same tasks; 3) that the relevant corporate law authorizes it to act in this fashion;[5] or 4) that the beneficiaries and participants of the plan understood the amendment to be the act of the Company.

The fact that the relevant provision of ERISA appears in Section 402 of the Act, rather than in Section 102, underscores the dubious character of the court of appeals' central thesis—that explication of detailed amendment procedures is necessary to disclose important substantive rights to participants and beneficiaries. Section 102 requires that the plan sponsor publish and distribute a Summary Plan Description for each of its plans containing a litany of required items intended "to reasonably apprise [the] participants and beneficiaries of their rights and obligations under the plan." Section 102(a), 29 U.S.C. § 1022(a). Section 102 further commands that the SPD be drafted in language "calculated to be understood by the average plan participant . . . ." The "procedure" requirement of Section 402(b)(3) is conspicuously absent from the list of items required for inclusion in the SPD, and, in fact, the amendment procedures are frequently contained in plan documents that most beneficiaries never see. Had Congress viewed the amendment procedures requirement as a substantive right—or even a significant procedural one—it seems quite likely that it too would have been listed in the text of Section 102.

Of equal, if not greater, importance, twenty years of experience under the Act demonstrate the idiosyncratic nature of the decision below. The Internal Revenue

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[5] *See* 8 Del. Code § 141(a) (corporation to be managed "by *or under the direction of* a board of directors") (emphasis added); *Hessler Inc. v. Farrell*, 226 A.2d 708 (Del. 1967) (actions of corporate officer with respect to retiree benefits were within his authority, and direct action by board of directors on the matter was not required to form enforceable obligation; officer's authority to act need not be explicitly granted by board).

Service, for example, has for some time approved prototype plan documents for use by pension plan drafters. Its approved "sample plan" amendment language merely provides that "[t]he sponsoring organization may amend any part of the plan." *See* 7 *Pension and Profit Sharing*, 2d ¶ 140,501(.74), at 140,573 (RIA 1994). Benefits treatises and commercial loose-leaf services in the pension area recommend amendment language no more particularized. David Dunkle's *Guide to Pension and Profit Sharing Plans: Taxation, Selection and Design* suggests the following: "[t]he employer reserves the right to amend the Plan at any time and in any respect . . . ." *Id.* at App. A-27 (McGraw-Hill Oct. 1991); *see also* 5A Rabkin & Johnson, *Current Legal Forms* (M. Bender 1993) at 13-1081 ("The Plan may be amended . . . by the Company"); *Corbel Pension Plan Forms* (1992) at DB-8-301 ("The Employer shall have the right . . . to amend the Plan . . . .").

Even among the nation's largest employers, which consistently utilize the most sophisticated legal advice available, language of the sort condemned by the court of appeals is commonplace. In its October 1994 survey, the Alliance found that *more than 90%* of the responding companies have sponsored at least one employee benefit plan containing language that would be unlikely to satisfy the court of appeals' standard. And these companies have liberally amended their plans, in reliance on the amendment provisions now cast in doubt by the Third Circuit's decision. Indeed, more than half of the responding companies with potentially invalid plans have made 20 or more changes in the past five years; more than a quarter have made 50 or more changes. Likewise, in its July 1994 survey, the Alliance found that almost three-fourths of the responding companies had relied on their reserved amendment powers to reduce or terminate particular benefits.

The conclusions reached by the court of appeals were neither required by the text of the statute nor consistent with its purpose. The federal government, plan designers, plan sponsors, and, to the extent they were aware of the procedures requirement at all, plan beneficiaries have all given the relevant statutory language a contrary construction for two decades.[6] This Court should follow, rather than frustrate, their settled expectations.

II. AMENDMENTS PROMULGATED IN GOOD FAITH BASED ON LANGUAGE FUNCTIONALLY IDENTICAL TO THAT IN PETITIONER'S PLAN SHOULD BE ENFORCEABLE, NOTWITHSTANDING ANY PERCEIVED VIOLATION OF SECTION 402(b)(3)

The Third Circuit moved directly from its ruling that petitioner's plan failed to satisfy Section 402(b)(3) to the conclusion that substantially all amendments made to the plan since its inception were necessarily void. It

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[6] Although plan beneficiaries have challenged plan amendments in many cases, and although in many of those cases the amendments were made pursuant to plan provisions that would not satisfy the Third Circuit's standard, the arguments advanced here by respondents apparently never even occurred to the plaintiffs, their lawyers, or the courts in the earlier litigation. No challenge based on Section 402(b)(3) appears in any of those cases. *See, e.g., Moore v. Metropolitan Life Ins. Indus., Inc.*, 856 F.2d 488 (2d Cir. 1988); ("The Company . . . reserves the right to change or discontinue any portion of the benefits" in the plan); *United Paperworkers Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384 (8th Cir. 1992) ("the plan administrators reserved the right 'to terminate, suspend, withdraw, amend or modify the Plan at any time' "); *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698 (11th Cir. 1993) ("the Company reserves the right to alter, amend, delete, cancel or otherwise change the plan . . . at any time"); *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133 (6th Cir. 1993) ("The Company reserves the right to modify, suspend or terminate the Plan, at any time and for any reason"); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.) ("the Company shall have the right . . . to amend, modify, suspend or discontinue the Plans"), *cert. denied*, 114 S. Ct. 196 (1993).

reached this result without any analysis whatever, as if an answer to the "liability" question automatically resolved all questions of remedy. Other appellate courts have seen the matter quite differently and have been unwilling to provide participants with an unanticipated benefits bonanza based on inadvertent procedural missteps by plan sponsors. Even if the Court is unwilling to declare such a retrospective reinstatement of benefits an inappropriate remedy in all circumstances for the kind of ERISA violation alleged here, the Court should, at minimum, apply to this case the general rule previously announced by the Court for new legal principles applicable to employee benefit plans, and on that basis should give any new standards announced here prospective effect only. We discuss each of these points below.

A. Retroactively Invalidating Amendments Made In Good Faith Because Of Perceived Shortcomings In The Plan's Description Of Amendment Procedures Would Be Unwarranted

The Fourth and Sixth Circuits have concluded that an employee benefit plan's failure to satisfy the requirements of Section 402(b)(3) does not render invalid all plan amendments. Under the rules established in those courts, amendments made in good faith, with no attempt to mislead or conceal, are enforceable, at least where the beneficiaries have no justifiable claim to detrimental reliance. In *Adams v. Avondale Indus. Inc.*, 905 F.2d 943 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990), the employer substantially limited the scope of its prior, unwritten severance practices by promulgating a written, less generous severance plan. The parties stipulated that the employer's unwritten historical practices constituted an ERISA welfare plan, and the court concluded that the more recent written document was an amendment to it. Because the prior unwritten practices necessarily failed to specify the entity with authority to amend the plan or the procedures to be used in making such amendments, the

plaintiffs relied on Section 402(b)(3) in arguing that the written amendment was invalid. The court rejected the claim, concluding that in the absence of evidence of detrimental reliance by the plaintiffs, it would "decline to impose the substantive remedy of prohibiting plan amendments in response to defendant's procedural violations." *Id.* at 949.

In *Biggers v. Wittek Indus. Inc.*, 4 F.3d 291 (4th Cir. 1993), the employer had a written plan but had failed altogether to reserve to itself the right to amend it. Nonetheless, the court enforced the terms of an amendment made by the employer, holding that "in the absence of provisions in a plan that provide procedures for amendment, a writing amends a plan [if it is] accompanied by a clear manifestation of an intent to alter the policy or plan." *Id.* at 296.

Curtiss-Wright's amendment easily satisfies the standards articulated in these cases. The Company acted in good faith through its executives to amend its plan, and, in view of the plan's explicit statement that the terms could be amended at any time by the Company, no showing of detrimental reliance would be possible. Indeed, one could stop well short of the actual holdings in *Biggers* and *Adams* and still conclude that the plan amendment at issue here was valid. In those two cases, it was at least possible that interested plan participants could have inferred from the silence of the plan sponsor that its historical practices were not subject to change; certainly there was nothing in the terms of the plans that would have alerted beneficiaries that amendment was possible.

Here, by contrast, a beneficiary of petitioner's plan would have recognized immediately that his benefits were subject to reduction or elimination by the Company, acting unilaterally, "at any time and from time to time." The Company plainly intended to amend the plan through its executives, and their work product was viewed by all

interested parties as action "by the Company." Against this background, there is little basis for the Third Circuit's conclusion that the plan's failure to describe amendment procedures in sufficient detail to satisfy the court's newly-announced interpretation of Section 402(b)(3) automatically renders invalid all prior amendments "advantageous to the sponsor's interest." Nothing in the statute compels this draconian result, and the Court should not accept it as the necessary consequence of the Third Circuit's peculiar construction of Section 402(b)(3).

B. If This Court Adopts The Third Circuit's Construction Of Section 402(b)(3), It Should Do So Only Prospectively

The Third Circuit apparently believed that its opinion made only an incremental change in the interpretation of a single subsection of ERISA, a "comprehensive and reticulated statute . . . ." *Nachman v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). For the reasons already explained, however, the Third Circuit's modest view of its handiwork is an illusion. The court's ostensibly marginal exercise in statutory construction will have seismic consequences for employee benefit plans and their fiduciaries if it is used to assess the validity of amendments made over the 20-year life of ERISA.[7] And, given the importance of these plans to the national economy and the lives of employees, retirees, and their dependents, it is difficult to overstate the consequences that

[7] To be sure, the applicable statute of limitations will limit the extent of fiduciary liability based on the new rule. But it is entirely likely that plan participants denied coverage within the statute of limitations, based on older amendments made outside of the statute of limitations pursuant to "defective" plan amendment procedures, will argue that they are entitled to recover. *Cf. Meagher v. International Ass'n of Machinists and Aerospace Workers Pension Plan*, 856 F.2d 1418 (9th Cir. 1988), *cert. denied*, 490 U.S. 1039 (1989) (statute of limitations for alleged underpayment of pension begins to run for each monthly payment with the issuance and receipt of monthly check).

would attend widespread application of the rule announced below.

Even in the mid-1970's, when pension, health, and welfare benefits were still referred to dismissively as "fringe benefits," employee pension assets accounted for more than $400 billion of investment in the national economy. *Los Angeles Dept. of Water & Power v. Manhart,* 435 U.S. 702, 721 (1978). As of 1992, the figure was closer to $2.48 trillion. Joel Chernoff, *Defined Contribution Soaring; Assets To Surpass Defined Benefit Dollars By 2003, Pension & Investments,* Mar. 22, 1993, at p. 1. It is commonly agreed that health services account for roughly one-seventh of the national economy, the great bulk being funded by employment-based health insurance. *Employee Benefits and Regulatory Policy: Hearings Before the Senate Committee on Finance,* 103d Cong., 2d Sess. (March 17, 1994) (available on LEXIS, NEWS library, FDCH file) (Testimony of Christopher W. O'Flinn); Janice Castro, *Paging Dr. Clinton,* Time Magazine, Jan. 18, 1993, at p. 24.

Clearly, then, any change in governing law that retroactively alters the allocation of scarce resources among providers, insurers, and beneficiaries in these areas threatens serious repercussions for the nation's economy. The rule announced by the Third Circuit would produce such a result. As noted earlier, *most* health and welfare plans, and a great many pension plans, have relied for years on amendment provisions functionally identical to the one condemned below. Better than 90 percent of the Alliance members that responded to the recent survey sponsor at least one plan with amendment language similar to that contained in the Curtiss-Wright plan. Many of these employers have sponsored multiple plans; a third of them have sponsored more than 20 such plans, with nearly half of that group having sponsored more than 50 such plans. More than 70 percent of those responding to the earlier survey have relied on their reserved right to amend their

benefit plans to reduce or terminate benefits. The experience of Alliance members in this regard is replicated in the economy as a whole. *See Retiree Health Plans: Health Benefits Not Secure Under Employer-Based System,* United States General Accounting Office Report No. GAO/HRD-93-125 (July 1993) (reporting, based on five separate studies, that as many as 93% of employers have "changed their retiree health benefit plans over the past few years"); *see also Employee Benefits: Company Actions to Limit Retiree Health Costs,* United States General Accounting Office Report No. GAO/HRD-89-31BR (Feb. 1, 1989).

It is apparent from the court of appeals' decision that the court gave little consideration to the administrative consequences of its holding. Fiduciaries are statutorily obligated to administer their plans according to their written terms. *See* Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D). The Third Circuit concluded that, for plans with amendment provisions like Curtiss-Wright's, those terms include only the plan as initially established and any amendments not "advantageous to the plan sponsor." Accordingly, to comply with the rule of decision below, every plan administrator will be obligated first to identify each amendment made over the past 20 years (a daunting task in itself) and then to determine whether the amendment was advantageous to the sponsor. This inquiry will not yield self-evident results. Will an amendment adopting a "cafeteria"-type plan allowing employees the opportunity to select from a menu of benefits in lieu of a single "one-size-fits-all" benefits package for all employees, be regarded as valid under this rule if the net result was a cost savings to the sponsor? Will an amendment that terminates dental coverage, but adds vision and auditory-aid coverage be enforceable? Will substitution of an HMO-style plan in place of an indemnity plan be valid if it limits choice of primary care physicians but adds well-visit and pediatric vaccination coverage? Will the validity of these changes

depend on whether they are revenue-neutral to the employer? If these amendments are deemed "advantageous to the sponsor" and thus subject to the new rule of law, will the liability of individual fiduciaries be offset by the value added by the amendments, *e.g.*, deducting from the value of the deleted dental care the value of the added vision care? Should the fiduciaries calculate their liability by analyzing the actual expenses of individual participants and determining the effect of each amendment, or by determining an aggregate or average cost of each amendment to participants in general (the damage computations in the courts below suggest the former)?

An employer's burden would not stop at its health plans, of course. A similar analysis would have to be performed for each ERISA-covered plan sponsored by each employer. An employer that sponsors multiple plans—many Alliance members have 50 or more—would have to take the foregoing steps for each amendment and for each pension, profit sharing, life insurance, severance, vacation, employee stock ownership, or other plan it may offer.

Assuming that the fiduciaries have unerringly classified all of the amendments (and thus know what the enforceable terms of the plan are); that the plan has not destroyed the archival records from which former participants can be identified; and that a value has been determined for each of the interrelated, now-invalid amendments, the fiduciaries will have to find the money to fund the "back benefits" that the court of appeals decision appears to require. In some instances, sponsoring employers will be obligated, or will choose, to pay the additional cost of compensating beneficiaries for past benefits, perhaps by withholding other planned improvements in wages or benefits. Yet some employers may have concerns about retaining employees with scarce and highly marketable skills if planned improvements in wages or benefits are not implemented for those employees. This

may cause the least skilled (and lowest paid) employees to bear the cost of any needed changes.

In many other cases, however, the employer's obligation to fund the relevant pension or welfare benefits is fixed, *e.g.*, as a function of hours worked. In these instances, the allocation of benefit dollars is a zero-sum game. For every plan dollar used to reimburse a retiree, for example, for dental care—services that both the plan and the beneficiary believed had been deleted years ago—there will be one less dollar available to pay for hospitalization for a current employee or his or her dependents. Thus, while employers have frequently attempted to cope with rising health costs by eliminating less important or less expensive items from coverage, the effect of the Third Circuit's ruling would be to shift the finite dollars available for coverage *from* the core medical needs covered by the amended plans *to* these more marginal aspects of the plan.

Although it is apparent that the court of appeals gave little or no thought to these practical consequences of its ruling, it did recognize, at least implicitly, the conundrum employers with plans like Curtiss-Wrights' would face *prospectively* if the court's opinion were carried to its logical conclusion. The court permitted Curtiss-Wright "one free bite" at amending its plan to cure the perceived defect under Section 402(b)(3) and thus to allow for future amendments. Of course, this "curative amendment" exception had no textual basis in the statute and its logic seems irreconcilable with the opinion as a whole. The exception serves, however, as a tacit recognition of the prospective problems posed by the decision; it also highlights the failure of the court even to consider the practical impact the ruling would have on plan amendments made over the previous two decades.

On several occasions, however, this Court has changed the fundamental legal rules underlying the operation of pension plans and has dealt in a comprehensive and sensible way with all of the consequences of those decisions.

In *Manhart*, for example, this Court announced that Title VII of the Civil Rights Act of 1964 prohibited the then-prevailing practice of requiring women to make larger contributions to a pension fund than male employees in order to receive the same benefit. In announcing this new rule of law, however, the Court recognized the destabilizing impact the rule would have if applied retroactively:

> [Pension] plans, like other forms of insurance, depend on the accumulation of large sums to cover contingencies. Risks that the insurer foresees will be included in the calculation of liability and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, *the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.*

Manhart, 435 U.S. at 721 (emphasis added). As the Court recognized, this concern for stability was a central focus of the design of ERISA; "Congress [has], in fact, stressed the importance of 'making only gradual and prospective changes' in the legal rules governing pension plans . . . ." *Florida v. Long*, 487 U.S. 223, 236 (1988), *quoting Manhart*, 435 U.S. at 721-22 n.40 (noting the "careful attention [paid by Congress] to the problem of retroactivity" in enacting ERISA); *accord, Nachman Corp. v. PBGC*, 446 U.S. 359 (1980).

The Court in *Manhart* noted that "[a]lthough we have no doubt about the application of [Title VII] in this case, we must recognize that conscientious and intelligent administrators of pension funds, who did not have the extensive briefs and arguments presented to us, may well have assumed that [the use of sex-linked mortality tables] was entirely lawful." 435 U.S. at 720. Because the

Manhart decision represented such a "marked departure from past practice," and resolved conflicting positions taken on the subject by the relevant federal agencies, the Court felt obligated to give "administrators of retirement plans time to adjust . . . ." *Id.*

The same principle was applied again in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) (*per curiam*). *Manhart* held sex-based differences in pension contributions unlawful; *Norris* challenged an employer's decision to offer an annuity plan that required equal contributions from men and women but paid reduced benefits to women, again based on sex-linked mortality tables. The Court held these plans unlawful as well, but again concluded that imposing this standard retroactively "would be both unprecedented and manifestly unjust." *Id.* at 1105 (opinion of Powell, J. joined by Burger, C.J., and Blackmun and Rehnquist, J.J., and, in relevant part, by O'Connor, J.). Although the Court had addressed the relationship between Title VII and sex-linked mortality tables at great length in *Manhart*, the *Norris* Court found that "an employer reasonably could have assumed that it would be lawful to make available to its employees annuities [with sex-differentiated payouts] offered by insurance companies on the open market." *Id.* at 1106. Because the *Norris* opinion represented a significant extension of *Manhart*—an extension conscientious plan administrators may not have anticipated—the Court applied its new rule prospectively only.[8]

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[8] Although *Manhart*, *Long*, and *Norris* all involved pension annuities, the provisions of ERISA cited by the *Manhart* Court as evincing the "careful attention [paid by Congress] to the problem of retroactivity" related both to pension *and* welfare plans. *Manhart*, 435 U.S. at 721-72 n.40. Similarly, although *Manhart*, *Norris*, and *Long* involved allegations of sex discrimination under Title VII, both this Court and the lower courts have recognized that the proscription against retroactive application of new rules of law in the employee benefits area applies as well outside the context of Title VII cases. *See, e.g., Nachman Inc. v. PBGC*, 446 U.S. 359, 367 (1980) (in case involving interpretation of ERISA pension

In this instance, there were no conflicting opinions from federal agencies like those in *Manhart*, and no prior court decisions even hinting that an amendment provision like that in the Curtiss-Wright health benefit plan might be defective. The IRS, the benefits experts, and the treatises all agreed that the language petitioner used met the requirements of the statute. Conscientious and sophisticated plan administrators in fact *did* believe, universally, that the language condemned in the decision below satisfied the statutory standard. In this sense, the Third Circuit's decision represents a far more acute departure from prior plan administration experience than did the rulings in *Manhart* or *Norris*. For this reason, if the Court finds that the Curtiss-Wright plan did not adequately describe its amendment procedures, the Court should announce its new principle of law prospectively only and permit employers time to bring their plans into compliance with the new standards. At the same time, the Court should declare that amendments made prior to the date of the decision in this case should not be found invalid or unenforceable based on the failure of plan amendment language to satisfy any new rule that may be established here.

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provision, this Court recognized "that new rules applying to pension funds 'should not be applied retroactively unless the legislature has plainly commanded that result'") (quoting *Manhart*, 435 U.S. at 721); *Helm v. South African Airways*, 44 Fair Empl. Prac. Cas. (BNA) 261 (S.D.N.Y. 1987) (Age Discrimination In Employment Act case; refusing retroactive application of extraterritoriality provision of statute to pension fund, citing *Manhart*).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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November 8, 1994

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No. 93-1935

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CURTISS-WRIGHT CORPORATION
Petitioner,

v.

FRANK C. SCHOONEJONGEN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than thirty-three million persons age fifty or older, dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity and purpose. One of AARP's primary goals is to promote the economic security of individuals as they age, by increasing the availability, security, equity, and adequacy of public and private health benefits. Approximately eleven million of AARP's members

sixteen million AARP members are under age sixty-five. They are generally not eligible for Medicare and therefore, rely on employer-funded health benefits.

Since the day AARP was founded in 1958, access to health care has been a major association priority. AARP's interest in health care benefits for an aging work force stems from a longstanding commitment to address the health needs of older people.

Health insurance coverage is essential to adequate medical care in this country. AARP members are greatly concerned that they have adequate health insurance coverage, especially in the event of hospitalization, long-term disability or catastrophic illness. Significant barriers frequently faced by AARP members in obtaining such coverage are preexisting medical conditions or exorbitant costs.

Many of AARP's members accepted offers of early retirement from their employers in exchange for certain incentives including the employer's promise to continue their health benefits. If employers are permitted to eliminate or reduce coverage for retirees under an employee health insurance plan, notwithstanding corporate representations to the contrary, simply because of rising health care costs, it may be virtually impossible for an employee to obtain comparable coverage elsewhere. Since a number of illnesses which require extensive treatment occur more frequently in the older population, AARP members face significant risks from an employer which breaks its promise of continued health benefits during retirement.[1] Accordingly, AARP respectfully submits this brief amicus

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[1] Older workers, however, most of whom are not covered by Medicare or Medicaid, are the most vulnerable. David C. Stapleton, et al., Health Care Costs and Older Workers, ES-2, 3 (Sept. 29, 1993).

curiae.[2]

BACKGROUND

While the current issues in this case revolve around technical issues concerning how a plan can be amended under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., it is important to step back and look at what this case is really about. The uncontroverted evidence in this case indicates that Petitioner, the Curtiss-Wright Corporation, induced its employees to retire under the promise of full health benefits. These promises were expressly made to all employees on or before retirement by officials in Petitioner's benefits department. Joint Appendix at 907, 910, 942, 974, 1003-1004, 1059, 1060.

Petitioner did not offer these retirement benefits merely as an act of corporate generosity. Benefit consultants have identified retiree health coverage as an essential element to the success of early retirement incentive plans,[3] since individual employees do not feel that will be able to afford to pay the costs of private insurance, especially if they are too young for Medicare.[4]

Petitioner, having induced its employees to retire on the basis of the explicit promise of lifetime benefits, then changed the terms of the plan to state the contrary -- namely, that

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[2] The written consents of the parties have been contemporaneously filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[3] Deborah Shalowitz, "As Recession Drags On, Employers Take a Shine to Window Plan Options," Business Insurance, Sept. 7, 1992, at 3-4; J. Quinn and R. Burkhaser, Retirement Preferences and Plans of Older American Workers, 17-18 (Oct. 1990).

[4] "Hang Tough, or Take the Gold Watch Early?", Forbes, May 5, 1986, at 158.

benefits would not be paid to any person who retired from a Curtiss-Wright plan which was subsequently closed. It is this blatant breach of an expressly made promise which forms the sole basis for this litigation.

We find it ironic that Petitioner and its amici argue that upholding this decision, by inhibiting the unfettered ability to amend employee benefit plans, could "unsettle" such plans. It is not the plan or the plan sponsor that is "unsettled" when a person retires on the express promise of lifetime health benefits that is later revoked. As discussed below, upholding the lower court's decision will not prevent plan sponsors from amending their plan. The Third Circuit decision merely requires plan sponsors to comply with fundamental principles of corporate formalities, at a minimum, when amending their ERISA-covered plans. Curtiss-Wright Corp. v. Schoonejongen, 18 F.3d 1034 (3d Cir. 1994), aff'g, No. 84-4542, slip op. (D.N.J. Oct. 4, 1990) (unpublished bench opinion).

ARGUMENT

I. PETITIONER DID NOT COMPLY WITH THE REQUIREMENTS OF ERISA § 402(b)(3).

A. Petitioner Did Not Even Comply with Its Own Amendment Procedure and Therefore Did Not Meet the Requirements of ERISA § 402(b)(3).

Whether or not the Petitioner's vague "reservation of rights" language complies with the requirements imposed under section 402(b)(3) of ERISA, it is abundantly clear that Petitioner did not even meet its own self-imposed obligations in the instant case. Petitioner's plan amendment procedure, in its entirety, stated as follows:

> The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan.

In this case, the District Court expressly found that "the Company" did not in fact amend the plan until 1990, and awarded damages on this basis. Thus, while Petitioner and its amici attempt to define the case as a legal issue revolving around the wording that must be set forth under ERISA § 402(b)(3) in order to retain the right to amend the plan, it is clear that whether or not the Petitioner's reservation of rights clause complied with ERISA, Petitioner failed to amend its plan properly.

It is not without irony that Petitioner now asserts that it properly amended the plan in 1983, given the fact that Petitioner had previously asserted that it had merely "clarified" its health plan. Only after the District Court made an express finding of fact that the inclusion of a new clause in the plan in 1983 terminating benefits of employees who retired from a plant that was subsequently closed "constituted an amendment of the plan, not a clarification of existing terms as defendant contends" (Schoonejongen, No. 84-4542, slip op. at 5) did the Petitioner then change its argument to the novel concept that various actions taken by its executives constituted compliance with formal plan amendment procedures.[2]

Having earlier acknowledged that it did not amend its plan, we fail to comprehend how Petitioner can now assert that it did in fact amend its plan, particularly in light of the complete lack of evidence that Petitioner ever took the first steps to formalize the dramatic changes it was implementing to its health plan.

While Petitioner and its amici argue the tired old saw that they are victims of "form over substance," the record of this case shows that at every step in this litigation the courts gave the benefit of the doubt to the Petitioner. Even after the District Court held that the Petitioner had "amended" rather than "clarified" its plan, and that the Petitioner had not provided the court with evidence of "written procedures" for such

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[2] Whether an informal unwritten procedure would have met the requirements of ERISA § 402(b)(3) is not before the Court.

amendments (Schoonejongen, No. 84-4542, slip op. at 7), the court would still have permitted the Petitioner to amend its plan through "informal" amendment procedures. In particular, the District Court heard evidence that an unwritten procedure might have existed whereby an executive committee would approve any changes to the plan. However, the District Court stated that "as the defendant admits, even those procedures were not followed in this case of the 1983 amendatory language." Id. Rather, the court found that the changes to the plan were included as a result of "routine redrafting" and were therefore not effective. Id. at 8.

Thus, the facts of this case simply do not support the alarmist language contained in each of the briefs of the Petitioner and its amici concerning the potential impact of the Third Circuit's decision on millions of other benefit plans. To be sure, the amendment procedures of many other benefit plans also contain "reservation of rights" language similar to that contained in Petitioner's plan. But in sharp contrast to the Petitioner, most benefit plans do in fact follow the procedures implicitly required by such a clause. As Judge Roth indicated in her concurring opinion, at the very least, a reservation of rights requires that the plan conform to the requirements imposed under state corporate law. Schoonejongen, 18 F.3d at 1039. In the instant case, since the Petitioner is registered as a Delaware corporation, this means that, at a minimum, the Petitioner's Directors must ratify corporate amendments, which Petitioner finally did in fact do in 1990. The District Court gave effect to the plan amendment from that time forward.

Given the fact that the lower court did give effect to the plan amendment from 1990 forward, following the Directors' ratification of the reduction in benefits, despite the express finding that Petitioner's plan amendment procedures was defective, we fail to see why this case would cast any doubt about employee plans in general. Under the decision below, even plans that are not in compliance with ERISA § 402(b)(3) will still be permitted to make plan amendments, so long as the plan amendments are ratified by the Directors of the company. At most, this case will only apply to plan sponsors, such as Petitioner, which do not respect fundamental notions of

corporate law.

B. Petitioner's "Reservation Of Rights" Clause Is Not A Procedure Within The Plain Language Of ERISA § 402(b)(3) And Thus That Section's Requirements Are Not Met.

The facts of this case are unique in that Petitioner did not follow its own amendment procedures or, for that matter, any corporate formalities. Thus, under even under an interpretation of ERISA § 402(b)(3) most favorable to the Petitioner, Curtiss-Wright still would not meet that section's requirements, and further interpretation of that section is unnecessary to decide this case. However, should the Court wish to provide additional analysis, it is clear that under the plain language of the statute, Petitioner's reservation of rights clause is not a procedure meeting the requirements of ERISA § 402(b)(3).

Petitioner and its amici argue that a reservation of rights clause meets the requirements for a procedure under section 402(b)(3). To accept their argument effectively reads that section out of the statute. Nothing in the statute supports these arguments.

In interpreting a statute one must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990), quoting Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985).

ERISA § 402(b)(3) sets forth two requirements. The first is that "every employee benefit plan shall . . . provide a procedure for amending such plan." The second is that "every employee benefit plan shall . . . provide a procedure for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3).

Apparently, Petitioner and its amici conveniently confuse the right to amend a plan and the method by which one

goes about doing so. All one has to do is to read Petitioner's reservation of rights clause to understand the difference.

A reservation of rights clause permits the plan's fiduciaries to amend the plan. However, a reservation of rights clause is not a procedure. A procedure is "a way of performing or effecting something or a course of action." New Riverside University Dictionary, Webster's II 938 (1988). Thus, an amendment procedure is the mechanism by which the fiduciaries' rights are put into motion. To put it into the vernacular: the reservation of rights clause is the destination and the amendment procedure gets you where you want to go. The argument concerning a procedure for identification of persons with the authority to amend the plan is no different.

Thus, to accept a bare reservation of rights clause, without more, as meeting the requirements of ERISA § 402(b)(3) makes a mockery of the statute's express language and torpedoes Congress' intent.[8] As this Court has recently reminded litigants:

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[8] All parties agree that there is a dearth of legislative history explaining this section. To counter the plain language of the statute, amici United States provides a tortured analysis of the purposes of the section within the overall structure of ERISA. Brief of amici United States in support of Petitioner at 12 - 20. Because of the plain language of the statute this is not necessary. Connecticut National Bank v. Germain, 112 S. Ct. 1146, 1149 (1992), quoting Rubin v. United States, 449 U.S. 424, 430 (1992) ["Courts must presume that a legislature says in a statute what it says there . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."]. During its analysis amici United States makes a troublesome suggestion that ERISA's reporting and disclosure requirements are more important than ERISA's fiduciary duty requirements. There is no basis in either the statute or legislative history for this implication. See §§ 2, 101-110, & 401-413 of ERISA, 29 U.S.C. §§ 1001, 1021-1029, & 1101-1113 (1988 & Supp. V. 1993).

> . . . [V]ague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration. See PBGC v. LTV Corp., 496 U.S. 633, 646-47 (1990). This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests -- not all in favor of potential plaintiffs [or defendants].

Mertens v. Hewitt Associates, 113 S. Ct. 2063, 2071 (1993). Because the language of ERISA § 402(b)(3) is plain, it must be enforced in accordance with its terms. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989).

II. SECTION 502(a)(1) OF ERISA AUTHORIZES THE REMEDY WHICH THE DISTRICT COURT PROVIDED TO THE RESPONDENTS IN THIS CASE.

The only conceivable remedy to rectify the Petitioner's abject failure to comply with the ERISA plan amendment procedures is to provide the Respondents with the benefits which they would have received absent the illegally promulgated plan amendment. ERISA clearly contemplates this result. Participants and beneficiaries have several avenues of relief:

> (a) A civil action may be brought -
>
> (1) by a participant or beneficiary
>
> * * *
>
> (B) to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits due to him under the plan.
>
> * * *

> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

Sections 502(a)(1) & (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(1) & (a)(3).

In the instant case, the District Court decision simply provided the remedy mandated under ERISA, and requested by the Respondents.[11] The Court awarded damages to the plaintiffs so that they could recover the benefits due them under the terms of the plan, pursuant to section 502(a)(1)(B) of ERISA.

The limited case law in this area clearly supports the view that a plan may not implement any plan provision which has not been promulgated pursuant to the requirements of ERISA and also accords with the remedy ordered by the District Court.

In a Seventh Circuit decision, Shoonmaker v. Employee Savings Plan, 987 F.2d 410 (7th Cir. 1993), the Court noted that while some courts have given effect to informal plan amendments which did not contradict the written plan amendments, the established rule was to invalidate plan amendments which are contrary to the written provisions of the plan. Id. at 412. In that case, the court held that a plan amendment that was not adopted pursuant to ERISA could not

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[11] Respondents framed their case as a suit to recover individual benefits. Petitioner and its amici conveniently forget that plaintiffs, not defendants, are masters of their claim and can decide the relief and hence the section of ERISA upon which they will rely. Cf. The Fair v. Kohler Die and Specialty Co., 228 U.S. 22, 25 (1913) ["Of course, the party who brings a suit is master to decide what law he will rely upon"].

be given effect, since it was in fact contrary to other terms in the plan. Accordingly, the court authorized damages to the plaintiff, pursuant to ERISA § 502(a)(1)(B) which permitted participants and beneficiaries to recover benefits due them under the plan.

In a recent case, Smith v. National Credit Union Administration Board, 36 F.3d 1077 (11th Cir. 1994), the Court of Appeals struck down an illegal plan amendment which had originally been promulgated through oral communications. Like the instant case, the plan later formally adopted the amendment in conformance with ERISA, but the Court nonetheless refused to give the amendment retroactive effect:

> We find no legally significant distinction between an oral amendment and an oral amendment which is formalized in a writing months or years later and retroactively applied to the time of the oral amendment. Because we find oral amendments impermissible, we likewise conclude that subsequently formalized and retroactively applied oral amendments are impermissible.
>
> * * * *
>
> Accordingly, we hold that any modification or amendment to an ERISA plan can be implemented or applied only after the amendment has been appropriately adopted in a formal, complete and written form.

36 F.3d at 1081.

The remedy fashioned by the District Court is not only permissible legal relief pursuant to section 502(a)(1)(B) of ERISA, but also comports with the equitable relief provisions authorized under section 502(a)(3) of ERISA. As this court has noted in various decisions, ERISA codified the common law of trusts. See, e.g., Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989), quoting, H.R. Rep. No. 93-533. Those

trust law principles clearly mandate as a matter of equity that a trust beneficiary be placed in the same position that he would have been in absent a breach by the fiduciary. In The Law of Trusts, for example, the authors describe the remedies which are available to the beneficiaries of a trust in order to protect their interests. These include specific enforcement of the trust, as well as "redress" for the breach of trust "by making specific reparation or by the payment of money or otherwise." A. Scott and W. Fratcher, The Law of Trusts, 4th Ed., Vol. III at 205-06.

Providing the amount of money lost by the participants as a result of the illegally promulgated amendment does not constitute "money damages." Even assuming that money damages for breaches by fiduciaries are not available under ERISA § 502(a)(3) -- an issue which the Supreme Court has not yet decided[2] -- the instant case does not present this issue. Rather, the District Court's judgement represents a classic equitable remedy permitted under the common law of trusts, which was codified by ERISA.

Permitting benefit plans to enforce the terms of illegal plan amendments would make a mockery of the protections built into ERISA and would provide a green light to fraudulent conduct. Whereas a Directors' meeting is a formal affair, with the Secretary of the Corporation taking minutes, abuses are bound to occur frequently if any corporate executive is permitted to amend the plan merely by inserting an "amendment" in a current plan. Faced with an employee who contracted an expensive illness for example, it would be all too easy for a plan to slip in a backdated plan "amendment" limiting benefits for that particular illness.

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[2] We note in this regard that the case of Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993), does not affect the outcome in this case, as Mertens was limited solely to the issue of money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. Of course, in the instant case, the issue involves a breach of duty by the fiduciaries.

Petitioner and its amici assert that ERISA § 502(a)(3) merely permits a participant or beneficiary to sue the plan in order to require the plan to reform its amendment procedures to comply with ERISA.[9] Such a proposition borders on the absurd.[10] The uncontroverted testimony in this case indicates that not a single participant or beneficiary was even aware that the plan "Constitution" even contained the obscure reservation of rights language that has been the focus of this litigation. Under the Petitioner's theory, the burden would be on the plan participants to research all plan provisions in order to determine which plan provisions do not comply with ERISA, and then hire a lawyer at their own expense to correct the deficient plans. Petitioner's theory essentially puts the burden on the plan participants and beneficiaries to ensure that the plan complies with ERISA, rather than the plan fiduciaries.

There is simply nothing in ERISA that imposes the burden of compliance on plan participants and beneficiaries for complying with ERISA. To the contrary, ERISA's entire statutory scheme places the responsibility for plan compliance squarely on the shoulder of the plan fiduciaries. For example, section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104, requires that a fiduciary act in accordance with the plan documents "insofar as such documents and instruments are consistent with the provisions of this subchapter [Title I of ERISA] and subchapter

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[9] See, e.g., Brief for amici Chamber of Commerce of the United States of America in support of Petitioner at 19; Brief for amici United States in support of Petitioner at 9.

[10] Just as absurd is the argument that although an amendment passed in violation of plan-specified procedures is invalid, an amendment passed in the absence of an amendment procedure required under ERISA § 402(b)(3) is not. See, e.g., Brief for amici United States in support of Petitioner at 9. On this basis, no plan would ever establish an amendment procedure because such a procedure could be used as a tool against it. Indeed, those plans without a procedure would be better off than those with a procedure.

III of this chapter."

At bottom, the relief ordered by the District Court was clearly appropriate under section 502(a) of ERISA. Any decision by this Court that a plan sponsor could enforce a plan provision which has the effect of drastically reducing benefits due the participants and beneficiaries, notwithstanding the fact that the provision was illegally promulgated, would make a mockery of ERISA's finely tuned enforcement mechanism.

CONCLUSION

For the foregoing reasons AARP respectfully asks the Court to affirm the decision of the Court of Appeals below.

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No. 93-1935

IN THE

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Petitioner,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

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MOTION OF NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37.4 of the Supreme Court Rules, the National Association of Securities and Commercial Law Attorneys ("NASCAT") hereby moves this Court for leave to file an *amicus curiae* brief in this case on behalf of Respondents. Counsel of record for Respondents have given NASCAT consent to file an *amicus curiae* brief in support of their position; however, counsel of record for Petitioner have refused to grant such consent.

As discussed at greater length in the Statement of Interest, NASCAT is an association of law firms consisting of attorneys located throughout the United States who represent parties in antitrust, consumer protection, employment, securities fraud and other types of commercial litigation. NASCAT and its members advocate the enactment and enforcement of effective federal and state laws to protect innocent persons, including consumers, investors, employees and retirees, from wrongful, deceptive and fraudulent conduct, including violations of the Employee

Retirement Income Security Act (ERISA). NASCAT's members currently represent thousands of employees and retirees in pending ERISA and state law class actions challenging termination and/or modification of company-funded health care benefits.

The *amicus curiae* brief which NASCAT seeks to file offers a broad perspective regarding the importance of this case and the potential impact of this Court's decision on thousands (if not millions) of employees and retirees. Thus, NASCAT's brief addresses the public policy and legal implications of a decision in this case on numerous persons who are not parties to this action.

For the reasons stated above, NASCAT respectfully requests leave to file its *amicus curiae* brief on behalf of Respondents in this case.

Respectfully submitted,

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QUESTIONS PRESENTED

Section 402(b)(3) of ERISA, 29 U.S.C. §1102(b)(3), requires every employee benefit plan to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." The questions presented are:

1. Whether Section 402(b)(3) is satisfied by a plan provision stating that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan."

2. Whether, in the absence of a plan-specified amendment procedure, any attempt by the sponsor to amend the plan is ineffective as a matter of law.

I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

The National Association of Securities and Commercial Law Attorneys (NASCAT) is an association of law firms consisting of attorneys located throughout the United States who represent parties in antitrust, consumer protection, employment, securities fraud and other types of commercial litigation. NASCAT and its members advocate the enactment and enforcement of effective federal and state laws to protect innocent persons, including consumers, investors, employees and retirees, from wrongful, deceptive and fraudulent conduct, including violations of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1101. *et seq.*

NASCAT has an interest in this case because its members currently represent thousands of employees and retirees in pending ERISA and state law class actions challenging termination and/or modification of company-funded health care benefits. NASCAT and its members strongly advocate effective private enforcement of ERISA's statutory provisions and in developing case law that deters employers from violating its provisions and accompanying regulations to the detriment of employees and retirees. As *amicus curiae*, NASCAT respectfully submits that the decision of the Third Circuit in this case should be affirmed.

II. SUMMARY OF ARGUMENT AND PROCEEDINGS BELOW

A. The Third Circuit's Decision In This Case Should Be Affirmed

Compliance with the law is not too much to ask of Petitioner; this is all the Third Circuit did in correctly holding that an employee benefit plan must contain procedures for amendment and must identify those persons with the power to amend, as Section 402(b)(3) of ERISA, 29 U.S.C. §1102(b)(3), expressly requires. Absent such provisions, *any* attempt to amend the substantive terms of a plan is invalid.

This Court should affirm the Third Circuit's decision for several reasons. First, to give effect to Curtiss-Wright's attempted amendment to its employee benefit plan would vitiate Congress's mandate that plans expressly provide amendment procedures. As the Third Circuit correctly observed, under Curtiss-Wright's theory of the statute plan sponsors would be better off leaving out the required provisions so as not to be later hemmed in by their own strictures. This would encourage plan sponsors to disregard §402(b)(3), thereby rendering it ineffective. Congress cannot have intended that employers could so easily ignore this important statutory requirement.

Second, permitting companies to amend plan terms without following a specified procedure would undermine ERISA's goal of ensuring that participants are fully advised of (or can ascertain at any time) their rights under employee benefit plans. The lax amendment rule that Curtiss-Wright advocates would eliminate the certainty that ERISA's reporting, disclosure, fiduciary and writing requirements

were expressly designed to protect. Moreover, because employers have up to 210 days after the end of a plan year to inform participants of amendments, participants would have no roadmap to follow during that period to determine whether important changes were made unless the plans contain an express procedure for amendment and for identifying those with the power to amend, as ERISA expressly requires. Moreover, if companies were permitted to amend their plans without having to follow a particular procedure, it would be difficult for employees to express their views or challenge decisions to amend. Indeed, absent a clear identification of the locus of amending power, participants may become lost in referrals from one person or body to another.

Third, although it was the participants in Curtiss-Wright's plan who originally brought this action, ERISA's requirements regarding a formal amendment procedure serve to protect the employer and the plan as well because the amendment procedure and identification of persons with authority to amend help ensure accountability. In the words of the Ninth Circuit, "the writing requirement protects the plan's actuarial soundness by preventing plan administrators from contracting to pay benefits to persons not entitled to such. . . ."[1] Requiring compliance with §402(b)(3) benefits *each* of the parties in the tri-partite ERISA

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[1] *Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1523 (9th Cir.), *amended*, 1993 U.S. App. LEXIS 37236 (9th Cir. 1993); *accord Smith v. Dunham-Bush, Inc.*, 959 F.2d 6, 10 (2d Cir. 1992); *Rodrigue v. Western & Southern Life Ins. Co.*, 948 F.2d 969, 971 (5th Cir. 1991).

relationship: the employer, the plan and the participants.

Curtiss-Wright advocates adopting a rule invalidating illegal amendments *only* if the absence of an amendment procedure causes *harm* to participants. However, this would place participants in the intolerable position of not knowing which provisions of their plans were valid or invalid at any given time. The same would be true if this Court were to adopt the view that illegal amendments should be invalidated only upon a showing of *detrimental reliance*, which Curtiss-Wright also proposes. Either rule could result in a plan having different meanings for different participants. If these proposed rules proposed were adopted there would be no certainty on the part of sponsors, administrators, or participants as to substantive amendments of a plan without years of litigation regarding whether there was "harm" or "detrimental reliance" in each instance.

Congress wisely avoided such a quagmire with the proverbial "ounce of prevention." ERISA mandates that plans specify a formal amendment procedure *in advance*, in the written plan documents. 29 U.S.C. §1102(b)(3). The plan must strictly abide by that procedure. 29 U.S.C. §1102(a)(1). A plan's failure to comply with these simple requirements makes the validity of any attempted modification unverifiable by sponsors, administrators and participants alike, thereby frustrating Congress's salutary goal.

Curtiss-Wright argues that affirming the Third Circuit's decision in this case would cause many (perhaps thousands of) plans to have to add presently non-existing amendment procedures. Yet, every time this Court clarifies a statute, those who are out of compliance

must change their practices. On the other hand, declining to enforce §402(b)(3) of ERISA, as Congress enacted, it would affect even more harshly the thousands (if not millions) of participants in those plans. They would be unable to ascertain the validity or substance of plan amendments and would, therefore, be uncertain about the operative terms of their plans.

Finally, notwithstanding Curtiss-Wright's protestations, the Third Circuit's decision is fully consistent with ERISA's comprehensive remedial scheme under several different theories of relief: (1) Under §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), the purported amendment could be deemed either arbitrary and capricious or simply a nullity, requiring enforcement of the pre-existing plan provisions; (2) under §502(a)(3)(A), 29 U.S.C. §1132(a)(3)(A), enforcement of the purported amendment could be enjoined as a violation of ERISA; and (3) under §502(a)(3)(B), 29 U.S.C. §1132(a)(3)(B), the participants could obtain traditional equitable relief either to restore them to the status quo ante -- that is, to put them in the position they occupied prior to the illegal amendment -- or to reform the plan document to eliminate the offending amendment. Each of these remedies is available under the plain language of ERISA's civil enforcement scheme.

B. The Proceedings In The Court Below

Both the district court and the Third Circuit rejected Curtiss-Wright's argument that its general reservation-of-rights clause satisfied the requirements of §402(b)(3) of ERISA, 29 U.S.C.

§1102(b)(3). As a result, the district court determined that the purported amendment taking away retirees' health benefits was invalid and the Third Circuit affirmed. *See Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034, 1038-39 (3d Cir. 1994) (*Curtiss-Wright*).

In its opinion denying Curtiss-Wright's motion for certification of an interlocutory appeal, the district court reiterated its determination that the company had violated ERISA by failing to include in its plan a procedure for amendment. The district court concluded that benefit plans may not be amended by informal means, such as those based only upon a general reservations-of-rights clause, because the validity of plan amendments can *only* be determined by reference to particularized procedures required to be set forth in written plans. The district court struck Curtiss-Wright's attempted amendment because of the absence of such procedures and the resulting impossibility of evaluating and determining the propriety of the attempted amendment. *Id.* at 1039.

The Third Circuit agreed, affirming that Curtiss-Wright's reservation-of-rights clause failed to satisfy the requirements of ERISA §402(b)(3), 29 U.S.C. §1102(b)(3). The Third Circuit concluded that "[a] simple reservation of a right to amend is not the same as a 'procedure for amending [the] plan.'" *Id.* The court emphasized that a general reservation clause fails to further one of the primary purposes of §402(b)(3), which is "to ensure that all interested parties will know how a plan may be altered and who may make such alterations. Only if they know this information will they

be able to determine with certainty at any give time what the plan provides." *Id.* As a result, the Third Circuit held the attempted amendment invalid. *Id.* at 1038-39.

III. ARGUMENT

A. A Boilerplate Reservation-Of-Rights Clause Does Not Satisfy Section 402(b)(3) Of ERISA

Beginning in 1966, Curtiss-Wright Corporation provided its retirees with post-retirement health coverage. *Curtiss-Wright*, 18 F.3d at 1036. In September 1976, the company established the Post-Retirement Health Benefits Program in accordance with ERISA, which had recently become effective. Various letters and documents, including a "Constitution," provided that "the Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." *Id.* at 1037. In 1983, relying entirely on this reservation clause as authority, Curtiss-Wright issued a new Summary Plan Description ("SPD") purporting to modify the plan by providing, for the first time, that a retiree's medical coverage under the plan would cease "upon termination of business operations of the facility" from which he or she retired. *Id.* Immediately thereafter, Curtiss-Wright closed one of its plants and, in accordance with the new provision, terminated the health benefits of workers who had retired from that plant. *Id.* at 1037-38.

Curtiss-Wright now asks the Court to hold that a boilerplate reservation-of-rights clause like the one included in its "Constitution" satisfies ERISA's mandatory requirement that

> Every employee benefit plan shall . . .
>
> (3) provide a *procedure* for amending such plan, and for identifying the persons who have authority to amend the plan. . . .

29 U.S.C. §1102(b)(3) (emphasis added). Because a general reservation-of-rights clause cannot satisfy §402(b)(3) of ERISA, this Court should affirm the Third Circuit's decision in this case. *See Curtiss-Wright*, 18 F.3d at 1038-39.

1. Modifying A Plan Without Following A Specified Procedure Would Violate ERISA And Undermine Its Goal Of Certainty

Curtiss-Wright contends that its generalized reservation clause satisfies ERISA's mandate that each plan set forth a procedure for amendment and for identifying the persons who have authority to amend. For the reasons stated by the courts below and for the reasons that follow, Curtiss-Wright is wrong.

If companies were able to satisfy their obligation under §402(b)(3) merely by including a generalized reservation clause (like Curtiss-Wright's) and were not required to follow a specifically delineated "procedure," they would undermine Congress's mandate that plan participants be apprised of and be able to effectively

challenge the sponsor's decisions regarding disqualification, ineligibility, or denial or loss of benefits. As emphasized by the Third Circuit, this would destroy one of ERISA's principal objectives – to ensure that participants are able to determine at any moment, by reviewing the plan documents, precisely what their rights and obligations are under employee benefit plans.

When enacting ERISA, Congress made clear that every employee benefit plan must be in writing and must include a procedure for amending the plan and for identifying those persons with the authority to amend. These requirements further Congress's goals that "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan . . . [and] know who is responsible for operating the plan." H.R. Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5077-78.[2] To permit companies the discretion to modify employee benefit plans in whatever manner they desire without requiring them to follow a specified procedure would eviscerate this statutory purpose and, as a result, participants would not know how their benefits could be modified and by whom, nor could they easily verify the terms of plans as modified.

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[2] *See also Schoonmaker v. Employee Sav. Plan of Amoco Corp.*, 987 F.2d 410, 413 (7th Cir. 1993) (quoting *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989)); *Miller v. Coastal Corp.*, 978 F.2d 622, 624-25 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1169 (3d Cir. 1990).

Affirming ERISA's primary purpose, courts have continuously sought to ensure that each participant be able to determine, by reviewing the plan documents, exactly what his or her rights are. For example, in *Algie v. RCA Global Communications*, 1994 U.S. Dist. LEXIS 4735, at *1-*2 (S.D.N.Y. April 12, 1994), former employees claimed entitlement to severance benefits under their previous employer's plan rather than benefits provided under its successor's plan. Expressly following the Third Circuit's ruling in *Curtiss-Wright*, the district court held that a simple reservation-of-rights clause does *not* satisfy §402(b)(3)'s requirement that an amendment procedure be included as part of each written plan. *Id.* at *7, *63-*68, *74-*75. The district court reasoned:

> The logic of this [*Curtiss-Wright*] analysis is compelling. The employer is required by ERISA to have a written plan and to specify a procedure for its modification in order "to ensure that 'every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan.'"

Id. at *66-*67 (citing cases and legislative history). Even an effective, unambiguous reservation-of-rights clause simply does not serve this purpose.[3]

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[3] Another example is provided by *Miller v. Coastal Corp.*, 978 F.2d at 624-25, in which the Tenth Circuit rejected an employee's claim that his retirement plan had been orally modified in a manner that would increase his benefits. The court ruled that plans may be modified only by following the formal written procedures, which §402(b)(3) requires be included in the plan, concluding that any other rule would prevent employees from being able to rely on plan documents and would, therefore, run afoul of one of

Under Curtiss-Wright's approach, the absence of an amendment procedure would permit companies to vary the terms of written plans via informal means because no controls would exist over the methods of amending. Such a practice would violate the well-established rule that plans cannot be modified either orally or by informal writings.[4] This settled rule is necessary to make certain that employees are fully advised of all of their rights under benefit plans. A contrary rule permitting companies to amend plans without explicit procedures in place necessarily erodes the certainty of plan terms which ERISA

ERISA's primary goals.

[4] *See, e.g., Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 137 (6th Cir.), *reh'g den'd*, 1993 U.S. App. LEXIS 20392 (6th Cir. 1993) (it is "a basic principle of ERISA that terms of a plan may not be modified or superseded by oral statements or other extrinsic evidence"); *Miller v. Coastal Corp.*, 978 F.2d at 624 ("[a]n employee benefit plan cannot be modified ... by informal communications ... regardless of whether those communications are oral or written; .... ERISA requires all modifications to an employee benefit plan to be written, 29 U.S.C. § 1102(a)(1), and to conform to the formal amendment procedures, 29 U.S.C. § 1102(b)(3)"); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 58-59 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1051 (1993) ("[b]ased upon this statutory scheme [ERISA § 402(a)(1) and (b)(3)], any modification to a plan must be implemented in conformity with the formal amendment procedures and must be in writing[;] [o]ral or informal written modifications to a plan ... are of no effect"); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) ("[b]y explicitly requiring that each plan specify the amendment procedures, Congress rejected the use of informal written agreements to modify an ERISA plan[;] ... [r]eading the 'written agreement' provision of subsection 1102(a)(1) in light of subsection 1102(b)(3)'s requirement of formal written amendments procedures necessitates our conclusion that ... ERISA precludes oral modifications of employee benefit plans").

strives to ensure. Participants may not become aware of important amendments until well after they are adopted,[5] thereby shrouding plan terms in secrecy – especially if the plan illegally fails to identify the persons who have authority to amend.

Another important purpose served by §402(b)(3) of ERISA is to ensure that employees have sufficient information to enable them to express their views concerning amendments or challenge decisions to amend and amendments. *See, e.g., Siskind v. Sperry Retirement Program*, 795 F. Supp. 614, 617 (S.D.N.Y. 1992). In *Siskind*, the district court held that a committee of officers that had express authority to amend the plan improperly delegated that authority to others. In support of its refusal to permit the attempted delegation, the court explained that

> [t]he statutory requirement of designation of the locus of amending power is not a mere formality. Clear identification of the source of amendments is crucial so that employees will not become lost in referrals from one person or body to another if they seek to determine how to argue to -- or challenge the decisions of -- the person or entity making decisions about retirement benefits. . . .

Id. Merely providing that the "company" reserves the right to amend falls well short of clearly identifying "the source of amendments" because plan participants equipped with only this general identifier

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[5] Section 104(b)(1) of ERISA requires employers to communicate plan modifications to participants and beneficiaries "no later than 210 days after the end of the plan year in which the change is adopted. . . ." 29 U.S.C. §1024(b)(1).

will have unnecessary difficulty determining the locus of amending power.[6] Likewise, absent a formal amendment procedure, it would be difficult to determine the process and sequence of events culminating in the adoption of an amendment in order to determine its validity.

It is well-settled that if, as is required by statute, a plan provides a written procedure for amending plan terms and identifying the persons with authority to amend, that procedure *must* be followed.[7] If the expressed procedure is not followed, the plan may not be amended. It is illogical, not to mention patently unfair, to enforce a specified plan procedure that complies with ERISA while

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[6] Section 402(b)(3) is in the fiduciary responsibility part of the statute. *See* 29 U.S.C. §§1101-1114. In the process of enacting ERISA, Congress declared:

> [T]he safeguarding effect of the fiduciary responsibility section will operate efficiently only if fiduciaries are aware that the details of their dealings will be open to inspection, and that individual participants and beneficiaries will be armed with enough information to enforce their own rights. . . .

H.R. Rep. No. 533, 93d Cong., 1st Sess. (1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4649. Absent a rule requiring that written plans contain specific procedures for amendment and for identifying those with the power to amend, employees will not "be armed with enough information to enforce their own rights." *Id.*

[7] *See e.g., Schoonmaker*, 987 F.2d at 413; *see also* Wm. T. Payne, *Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits*, 10 The Labor Lawyer 91, 101 (1994).

permitting companies like Curtiss-Wright to amend plans without conforming to a specified procedure, simply by virtue of including only a reservation-of-rights clause in their plans which does not comply with statutory requirements. The Third Circuit recognized that such a result "would render requirements of §402(b)(3) meaningless. . . ." *Curtiss-Wright*, 18 F.3d at 1038. Surely this would violate the settled rule that statutory provisions are to be construed so as to give them meaningful effect.[8] In this regard, the Southern District of New York recently stated:

> If an employer could modify a plan by any procedure in the absence of a specified plan procedure, it would in effect benefit by failing to comply with [§]402(b)(3), a result that would sabotage the statutory scheme and the underlying policy of full notice to plan participants.

Algie, 1994 U.S. Dist. LEXIS 4735, at *67. As a practical matter, if this Court were to rule that general reservation clauses satisfy §402(b)(3), in the future very few (if any) plans would contain a procedure for amendment and for identifying those with the authority to amend; such a ruling would simply write §402(b)(3) out of ERISA and out of existence. As emphasized by the Third Circuit, adopting

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[8] *See, e.g., U.S. ex rel. Harlan v. Bacon*, 21 F.3d 209, 210-11 (8th Cir. 1994). Simply put, courts are to construe statutes "so that no part will be inoperative or superfluous, void or insignificant." *Sekula v. FDIC*, 1994 U.S. App. LEXIS 31382, at *19 (3d Cir. Nov. 9, 1994); *accord Mears Transp. Group v. State of Florida*, 34 F.3d 1013, 1019 (11th Cir. 1994); *Commercial Union Ins. Co. v. United States*, 999 F.2d 581, 587 (D.C. Cir. 1993).

the rule championed by Curtiss-Wright "would place those who violate §402(b)(3) . . . in a better position than those who comply . . . and would thereby discourage employers from complying with §402(b)(3)." *Curtiss-Wright*, 18 F.3d at 1040.

Courts have consistently refused to allow employers to benefit from their failure to comply with ERISA. For example, companies that offer plans and promise benefits thereunder to their employees are required to honor their commitments without regard to whether the plans have been reduced to writing as required by ERISA. *See, e.g., Donovan v. Dillingham*, 688 F.2d 1367, 1372-73 (11th Cir. 1982); *Sprague v. General Motors Corp.*, 857 F. Supp. 1182, 1190-92 (E.D. Mich. 1994). To provide such violators freedom from liability would turn ERISA's writing requirement on its head. In the same way, allowing employers such as Curtiss-Wright to amend plan terms in any way they choose due to the absence of any required written procedure for amendment would eviscerate §402(b)(3).

2. The Common Law Of Trusts Does Not Validate The Attempted Amendment

Curtiss-Wright and its *amici* attempt to convince this Court that, absent the required amendment procedures, it should look to the common law of trusts to determine the validity of attempted plan amendments. They are wrong. This Court has approved of looking to the common law to fill gaps in ERISA *only* when doing so effectuates Congressional policy concerns. *See, e.g., Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108-110 (1989); *Pilot Life*

Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987).[9] *Cf. U.S. v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973) (common law "may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress"). The common law precept that Curtiss-Wright proposes, however, flies directly in the face of ERISA. Curtiss-Wright and its *amici* argue that the power to amend a welfare benefit plan is inherently reserved to the employer and, therefore, the Petitioner is in the same position as a settlor at common law who has reserved the power to amend but not provided a method for exercising it. They contend that the following common law standard should control:

> [T]he settlor may, in the absence of a specified procedure, exercise the power to amend in any manner that sufficiently manifests his intention to modify the trust.

Restatement (Second) of Trusts §331 comment c (1959). *See generally* IV Austin W. Scott & William F. Fratcher, *The Law of Trusts*, §331 (4th ed. 1989). The problem with this analogy is its fatally flawed hypothesis. Curtiss-Wright is *not* in the same position as a settlor at

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[9] *See also Glass v. United Omaha Life Ins. Co.*, 33 F.3d 1341, 1347 (11th Cir. 1994) (in developing federal common law, courts "must adhere to the congressional policy concerns that inform ERISA"); *Tassinare v. American Nat'l Ins. Co.*, 32 F.3d 220, 225 (6th Cir. 1994) ("federal common law has only been fashioned when it is necessary to effectuate the purposes of ERISA") (interior quotation marks and original ellipsis omitted); *Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 559 n.5 (4th Cir. 1994) (courts may develop federal common law of ERISA only to the extent it "is not inconsistent with congressional policy concerns").

common law who has reserved the power to amend but not provided a method for exercising it. The difference is that here, ERISA, a "comprehensive and reticulated statute," *Nachman Corp. v. Pension Ben. Guaranty Corp.*, 446 U.S. 359, 361, *reh'g denied*, 448 U.S. 908 (1980), *requires* that Curtiss-Wright specify a procedure for amending, whereas a settlor at common law has no such obligation.[10]

Curtiss-Wright's flawed hypothesis leads to an equally flawed conclusion. The statutory requirement that a plan specify an amendment procedure and then abide by it is patently inconsistent with the common law rule that a settlor can effectuate an amendment "in any manner that sufficiently manifests his intention" to do so.[11] The common law rule that Curtiss-Wright proposes is simply inapplicable to this case.

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[10] Of course, the circumstances under which a settlor may amend the trust and the methods by which he or she may amend it depend on the terms of the trust. The failure to follow the procedure(s) specified render such amendments or modifications invalid. *See, e.g., Northwestern Univ. v. McLoraine*, 438 N.E.2d 1369 (Ill. App. 1982); *In re Trust of Kaufmann*, 460 Pa. 24, 331 A.2d 209 (1975); *Restatement (Second) of Trusts* §331.

[11] *See Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1454 (4th Cir. 1992) (concurrence) ("[f]ederal common law does not provide a backdoor through which these statutory requirements [regarding plan amendments] may be evaded"); *National Cos. Health Ben. Plan v. St. Joseph's Hospital, Inc.*, 929 F.2d 1558, 1571 (11th Cir. 1991) (because ERISA addresses the matter, "a federal court could not create federal common law to apply to these [amendment] issues"). *See also Nachwalter*, 805 F.2d at 959 ("[a] federal court may create federal common law based on a federal statute's preemption of an area only where the federal statute does not expressly address the issue before the court") (citations omitted).

Had Congress wanted to provide for the right to amend "in any manner that sufficiently manifests [the] intention," *Restatement (Second) of Trusts* §331 comment c, it could easily have done so. It did not. Instead, Congress imposed a limitation on the right to amend, requiring that plans provide for and follow an express procedure. *See, e.g., Mertens v. Hewitt Associates*, 113 S. Ct. 2063, 2067 (1993) ("[t]hat limitation appears all the more deliberate in light of the fact that [a different rule] was well established under the common law of trusts"); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (courts are to "assume that Congress is aware of existing law when it passes legislation"). Thus, the common law rule advocated by Curtiss-Wright is inapplicable.

B. If A Plan Violates ERISA By Containing No Amendment Procedure, Substantive Amendments To The Plan Are Invalid

1. Congress And The Courts Routinely Rely On Adherence To Required Procedures To Promote Substantive Goals

Curtiss-Wright's and its *amici*'s expression of astonishment that the Third Circuit ordered what they call a "substantive" remedy for a "procedural" violation of the statute is itself astonishing. Such relief is commonly granted under ERISA, which is a statute dealing largely with plan administration, procedure and disclosure.[12] Indeed,

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[12] When enacting ERISA, Congress observed that

> [d]isclosure has been seen as a device to impart to

"[u]nder ERISA, . . . no great wall divides procedural from substantive violations." *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1353 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985). Ensuring proper compliance with procedure is one of the judiciary's best tools to promote substantive goals without becoming enmeshed in the merits of the particular goals – a task generally reserved for the legislative branch. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (minimum wage law was not "arbitrary or capricious, and that is all we have to decide").

The statutory requirement of an amendment procedure necessarily has substantive implications which renders demonstration of reliance or prejudice unnecessary. In *Blau*, 748 F.2d at 1353-56, the Ninth Circuit was particularly concerned that the absence of disclosure regarding the plan and of claims procedures rendered *any* decision to deny benefits arbitrary and capricious. The court stated that "[u]nder ERISA . . . no great wall divides procedural from substantive violations. Although reporting and disclosure requirements are arguably procedural, it is there procedural requirements that alter the very balance of knowledge and rights

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> employees sufficient information and data to enable them to know whether the plan was . . . being administered as intended. It was expected that the information disclosed would enable employees to police their plans.

H.R. Rep. No. 533, 93d Cong. 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649.

between covered employees and their employer." *Id.* at 1353. Correspondingly, Curtiss-Wright attempts to impute an interpretation to plan language never disclosed to participants which would enable it to deny benefits to them. The Ninth Circuit rejected this attempt in *Blau*, noting:

> [that] the evils against which ERISA was enacted to guard -- insecurity, lack of knowledge, and inability to plan administration – are just the evils that appear in Del Monte's administration of its plan.

Id. at 1356.

Much of ERISA is devoted to procedures for administration of plans. The statute does not require sponsors to offer employee benefit plans and it does not regulate welfare benefits that an employer may choose to offer. Once an employer decides to offer such benefits, however, ERISA is designed to ensure that the participants will actually receive the benefits promised. It does so through a multitude of requirements relating to plan administration, procedure and disclosure. The importance of compliance with ERISA's procedural requirements cannot be understated, as this is the manner in which Congress chose to protect plan participants and their beneficiaries. *See Firestone Tire*, 489 U.S. at 113 ("ERISA was enacted 'to promote the interests of employees and their beneficiaries in employee benefit plans'" (quoting *Shaw v. Delta*

Airlines, Inc., 463 U.S. 85, 90 (1983)).

2. Courts Often Remedy Procedural Errors With Substantive Relief

In the ERISA context, perhaps the best-known illustration of substantial consequences resulting from a lack of specified procedure is provided by the *Firestone Tire* case, where an ERISA plan was created by two sentences in an employment handbook. *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 146 (3rd Cir. 1987). The "plan document" at issue plainly lacked virtually all procedures that plans are required to contain. One consequence, this Court held, was that decisions of the plan fiduciaries were to be ignored in subsequent judicial proceedings. *Firestone Tire*, 489 U.S. at 115.

A common procedural error involving plan amendments is for a plan to be administered in accordance with oral or informal written modifications. As shown above, this is contrary to ERISA's requirement that plans be maintained pursuant to a written instrument and courts routinely invalidate such modifications, even if it means adversely affecting the plan as a whole. Another type of procedural error involving plan amendments occurs when a plan gives inadequate notice of material modifications. *See* 29 U.S.C. §1022(a)(1) (requiring participants to be apprised via SPD of any "material modification in the terms of the plan"). Under Department of Labor regulations, such notice must be "written in a manner calculated to be understood by the average plan participant" and must be accurate and comprehensive in describing the changes. 29 C.F.R.

§2520.104b-3; *see also* 42 Fed. Reg. 14,273 (Mar. 15, 1977) (SPD must be "comprehensive [and] accurate"). Failure to provide such notice can nullify (or make it arbitrary and capricious to give effect to) an attempted amendment.[13]

A third type of procedural error involving plan amendments occurs when a plan provides an amendment procedure, as required by §403(b)(3) of ERISA, but purports to adopt an amendment *without* complying with that process. Such amendments are ineffective to alter the terms of the plan.[14] The Third Circuit correctly reasoned in this case

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[13] *See Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 74 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989) (plaintiff restored to status quo ante where he "did not receive fair notice" of an amendment); *Baker v. Lukens Steel Co.*, 793 F.2d 509, 513 (3d Cir. 1986) (inadequate notice is a factor in determining whether an amendment is arbitrary and capricious); *Chambless v. Masters, Mates, and Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) ("the content of the notice regarding Amendment 47 was inadequate," which apparently contributed to court's ruling that amendment was arbitrary and capricious); *Valle v. Joint Plumbing Industry Board*, 623 F.2d 196, 203-04 (2d Cir. 1980) (in pre-ERISA plan, inadequate notice is one factor that can make an amendment arbitrary and capricious).

[14] *See Serrato v. John Hancock Life Ins. Co.*, 31 F.3d 882, 884 (9th Cir. 1994) ("the employer may modify or withdraw these benefits at any time, provided the changes are made in compliance with ... the terms of the plan" (citing *Doe v. Group Hospitalization & Medical Services*, 3 F.3d 80, 84 (4th Cir. 1993)) (emphasis added); *Elmore v. Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994) (court invalidated amendment for failure to comply with procedure, stating that "only representations adopted in accordance with the amendment procedures outlined in the formal plan documents will suffice"); *Law v. Ernst & Young*, 956 F.2d 364, 370 n.9 (1st Cir. 1992) (where a "plan provided that it could only be amended 'by action of its Management Committee[,] amendment allegedly adopted by members

that, given this rule, it would be anomalous indeed to give effect to purported modifications when the plan *fails* to provide an amendment process and thereby violates §402(b)(3). As the court below stated, this "would place those who violate §402(b)(3) . . . in a better position than those who comply . . . and would thereby discourage employers from complying with §402(b)(3)." *Curtiss-Wright*, 18 F.3d at 1040.

Another procedural error that can have dramatic substantive consequences occurs when an SPD is inadequate, either in its content or its distribution to participants. Under ERISA, plan administrators must furnish an SPD to each participant within 90 days after he or she becomes a participant and periodically thereafter. 29 U.S.C. §1024(b). The SPD must contain, *inter alia*,

> a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits;

29 U.S.C. §1022(b). Failure to adequately include these provisions often results in the *granting of benefits* that otherwise would have

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"through their individual actions" would be invalid).

been denied.[15] Another relatively common error arises from ERISA's requirement that SPDs must describe

> the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied. . . .

28 U.S.C. §1022(b). Failure to include this simple procedural language negates important protections that a plan otherwise would have, including the right of lay fiduciaries to interpret the plan and grant or deny claims subject only to limited judicial review (assuming the plan grants such discretion).[16] A plan can lose these same protections if it issues a denial

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[15] *See, e.g., Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 385-87 (9th Cir. 1994) (because SPD's "purported exclusion for pre-existing conditions is not conspicuous enough to attract the attention of a reasonable layman," the exclusion is unenforceable); *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1186 (3rd Cir. 1985) (due to inadequate notice in SPD of alternative elections, beneficiary of deceased spouse was awarded an amount that, with hindsight, was the greater of the two possible benefits: "[i]t is the employee's right to be informed of his rights ... that the Act is intended to protect").

[16] *See, e.g., Berger v. Edgewater Steel Co.*, 911 F.2d 911, 916 n.4 (3d Cir. 1990), *cert. denied*, 499 U.S. 920 (1991) ("there were no administrative remedies under the severance pay policy .... Thus, they could not exhaust their administrative remedies prior to seeking judicial relief"); *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 594 (2d Cir. 1993) ("exhaustion in the context of ERISA requires only those administrative appeals provided for in the relevant plan"); *Blau*, 748 F.2d at 1353 ("Del Monte's claims procedure fails simply because there was none"); *Thayer v. Alaska Teamster-Employer Pension Trust*, 16 Emp. Ben. Cas. 1877, 1880 (D. Alas. 1993) ("there were no procedural provisions for the type of review envisioned by 29 U.S.C. § 1132, and ... therefore, plaintiffs had no internal remedies to exhaust"); *Martin v. Marriott Corp.*, 15 Emp. Ben. Cas. 1217, 1222 (D.D.C. 1992) (without evidence that "plan

of benefits statement that does not meet the simple procedural requirements of §503, 29 U.S.C. §1133.[17]

Still another example of a procedural error resulting in substantive consequences involves the statutory provision that allows plan fiduciaries to allocate responsibilities among themselves in accordance with procedures set forth in the plan instrument. 29 U.S.C. §1105(b), (c). If the procedures are followed correctly, the delegating fiduciary is immune (with certain limited exceptions) from liability for the delegee's breaches. *Id.* However, such a delegation is invalid in the *absence* of plan procedures, or if the delegating fiduciary does not follow the plan procedures.[18]

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contained any remedies to be exhausted," doctrine is inapplicable); *Schwartz v. Interfaith Medical Center*, 715 F. Supp. 1190, 1193 (E.D.N.Y. 1989) (exhaustion inapplicable because "[t]here are ... no administrative remedies for plaintiffs to exhaust").

[17] *See, e.g., Vanderklok v. Provident Life & Acci. Ins. Co.*, 956 F.2d 610, 617 (6th Cir. 1992) ("[b]ecause defendant Provident failed to give appropriate notice, it is not entitled to the protections concerning administrative review") (original brackets omitted); *Leonhardt v. Holden Business Forms Co.*, 828 F. Supp. 657, 670 (D. Minn. 1993) ("[b]ecause the administrator failed to give appropriate notice, it is not entitled to the protections concerning administrative review"); *Dennis v. Sawbrook Steel Castings Co.*, 13 Emp. Ben. Cas. 1950, 1956 (S.D. Ohio 1991) (when "no beneficiary was ever given written notice of a specific denial," "it would be unjust to dismiss plaintiffs' claims in this action for failure to exhaust administrative remedies").

[18] *See, e.g., Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 584 (1st Cir. 1993) (where plan provides no "express procedures for the delegation of the Fiduciary's discretionary authority to a delegate," delegation of fiduciary duty fails pursuant to § 405(c)(1)); *Van Hoove v.*

3. The Relief That The Courts Below Granted Is Provided For Under ERISA's Civil Enforcement Provisions

The Third Circuit's ruling in this case meshes well with ERISA's "six [now eight] carefully integrated civil enforcement provisions found in §502(a) of the statute. . . ." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-147 (1985). The relief awarded to Respondents is available under several such provisions. First, under §502(a)(1)(B), a participant may sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . ." 29 U.S.C. §1132(a)(3)(A). The Third Circuit affirmed the district court's holding that the disputed amendment was not part of the plan by declaring the amendment a nullity or implicitly deeming it arbitrary and capricious. The court then enforced the remaining valid provisions of the plan, which is exactly what is contemplated in a suit for benefits under §502(a)(1)(B).

Second, under §502(a)(3)(A), participants may sue "to enjoin any act or practice which violates any provision of this subchapter or

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Mid-America Building Maintenance, 841 F. Supp. 1523, 1536 (D. Kan. 1993) (delegation invalid "because the policy instruments did not expressly provide a procedure for allocation" pursuant to § 405(c)(1)); *McManus & Pellouchoud, Inc. Employees' Profit Sharing Trust v. L.F. Rothschild, Unterberg, Towbin*, 1989 U.S. Dist. LEXIS 10098, at *3 (N.D. Ill. 1989) (delegation invalid because trust agreement "provides that the trustees, as named fiduciaries, can only delegate their fiduciary responsibilities to a third person in writing" and no such writing was ever made).

the terms of the plan. . . ." 29 U.S.C. §1132(a)(3)(B). The decision below could properly be characterized as an order preventing enforcement of the purported amendment. The amendment was adopted in violation of both ERISA and the terms of the plan, since the plan specified no amendment procedure.

Third, under §502(a)(3)(B), participants may sue "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan. . . ." 29 U.S.C. §1132(a)(3)(B). Relying in part on ordinary principles of statutory construction, this Court recently held in a suit for money damages that "other appropriate equitable relief" provides for the recovery of "those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Mertens*, 113 S. Ct. at 2069. This Court did *not* limit its construction of the statutory phrase "other appropriate equitable relief" *only* to injunctions, mandamus and restitution; rather, it identified those three remedies as *examples* of what was typically available in equity, indicating that traditional equitable relief is available under §502(a)(3)(B). *Id.*

At equity, restoration of a party to the status quo ante is a well-recognized form of relief. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 399 n.2 (1946) ("the court of equity may restore the status quo"). Thus, restoring Respondents to the position they occupied before Curtiss-Wright attempted illegally to amend the plan

-- namely, invalidating the amendment -- is well within the contours of §502(a)(3)(B) of ERISA.

Likewise, in the context of welfare benefit plans, "reformation of written instruments is also a form of equitable relief that entails the enforcement of agreements otherwise than as written." *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1300 n.3 (6th Cir.), *reh'g en banc denied*, 1991 U.S. App. LEXIS 26627 (6th Cir. 1991). "Reformation is not an incident to an action at law, but can be granted only in equity." *United States v. Milliken Imprinting Co.*, 202 U.S. 168, 173 (1906) (Holmes, J.). Thus, enforcing the Curtiss-Wright plan without the inclusion of the offending amendment was well within the court's authority under §502(a)(3)(B) of ERISA.

As demonstrated above, the Third Circuit's decision invalidating Curtiss-Wright's attempted amendment was proper under several of ERISA's civil enforcement provisions. Therefore, the court below adopted an appropriate remedy which is provided for under ERISA.

IV. CONCLUSION

The decision of this Court in this case will undoubtedly affect thousands (if not millions) of employees and retirees who bargained for and earned health care benefits in exchange for their years of labor. For the past twenty years, those innocent persons have placed their faith in ERISA as a statutory bulwark intended to protect them from arbitrary and unfair decisions and practices, such as those engaged in by Curtiss-Wright in this case, which necessarily endanger the security of their hard-earned retirements and accompanying benefits. In this case, the

Third Circuit properly enforced ERISA's clear and well-intended statutory provisions and found that Petitioner had violated them. Respondents (and the myriad of employees and retirees they necessarily represent in this case) ask for nothing more and are entitled to nothing less from this Court.

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